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TRANSCRIPT OF RECORD

Supreme Court of the United States

OCTOBER TERM, 1955

No. 231

BILL HATAHLEY, ET AL., PETITIONERS,

vs.

UNITED STATES OF AMERICA

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT.

PETITION FOR CERTIORARI FILED JULY 13, 1955
CERTIORARI GRANTED OCTOBER 10, 1955

SUPREME COURT OF THE UNITED STATES

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[fol. 1]

IN THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

No. 4933

UNITED STATES OF AMERICA, Appellant,

vs.

BILL HATAHLEY, WIDOW SLEEPY, CHARLIE BURKE, LUCY HARVEY, Shorty Smiles, Natona Begay, Mark Tootsonian, Mary Jay, John Jay, Frank Joe, Danny Jones, Jim Antez, Cyrus Begay, Allen Ben, Willie Harvey, Tom Jones, Hosteen Sakezzie, Fred Johnson, Jim Hatahley, Billy Antez, Little Wagon, Tom Mustash, Slim Todachennie, Mary's Boy, Eddie Nocki, Susie Sleepy, Mrs. Lilly Thomas, Jim Harvey, Tom's Father and Tom Belatso, Appellees

APPELLANT'S STATEMENT OF POINTS ON APPEAL—Filed July 24, 1954

The United States of America, appellant in the above-entitled case, respectfully states herewith the points upon which it intends to rely on appeal.

The district court erred in the following particulars:

Liability

1. In concluding that the provisions of Title 64, Chapter 2, Sections 1-7, Utah Code Annotated 1943, relative to the elimination of abandoned horses on the open range, are not available to the United States on land of the public domain in Utah embraced within a grazing district under the Taylor Grazing Act of June 28, 1934, 48 Stat. 1269, 43 U.S.C. Secs. 315, et seq.

2. In concluding that the provisions of Title 64, Chapter 2, Sections 1-7, Utah Code Annotated 1943, relative to the elimination of abandoned horses on the open range, were not applicable to the Indian horses and burros involved here

[fol. 2] and, in any event, were not complied with by the agents and employees of the United States.

3. In concluding that the agents and employees of the United States failed to comply with the provisions of the Taylor Grazing Act, supra, and the Federal Range Code, 43 C.F.R. 161.1, et seq., issued thereunder, with respect to the elimination of unlawful grazing on the Federal range.

4. In concluding that the acts of the agents and employees of the United States in rounding up and disposing of plaintiff's horses and burros constituted a tort for which the United States is liable under the Federal Tort Claims Act, 28 U.S.C. Secs. 1346(b) and 2671-2680.

Conduct of the Trial and Damages.

1. In admitting, considering and making an award based upon testimony of a replacement cost of $1,000 for each horse and burro taken which represents the purchase price of a brood mare and the cost of feeding the mare and its colt for at least 5 years.

2. In admitting, considering and making an award based upon testimony that a horse is traded among the Indians in exchange for 5 cows with a market value of $200 per head or from 30 to 35 sheep with a market value of $30 per head.

3. In admitting, considering and making an award based upon testimony that the rental value of a horse in the State of Utah at the time involved was $5 per day.

4. In admitting, considering and making an award based upon testimony that the reasonable market value of a white man's horse at the time and place involved was $300.

5. In awarding damages for the loss of the horses and burros without any evidence as to the age, health, size, fitness, training or other qualifications of each animal which affect its value.

6. In awarding damages in the amount of $100,000 or any part thereof for the loss to the Indians of the horses and burros.

7. In admitting, considering and making an award based upon testimony of consequential losses of cattle and sheep [fol. 3] in the absence of any evidence whatever as to the quantity of cattle and sheep lost by each Indian or even the quantity lost collectively.

8. In admitting, considering and making an award based upon testimony of such consequential losses and inconveniences as inability to gather pine nuts and fire wood, hunt rabbits and deer, attend ceremonial, religious and social gatherings, and the like, in the absence of any evidence whatever from which to estimate either the amount, the extent, or the monetary value of such losses and inconveniences.

9. In making a single award in a lump sum for the loss of horses and burros, consequential losses and inconveniences, and mental pain and suffering to all plaintiffs collectively.

10. In making an award in a lump sum for consequential losses and inconveniences and mental pain and suffering as to all plaintiffs collectively, without any evidence as to the extent of such losses by individuals or collectively and without any accurate inference being available as to individual or collective losses in these respects from the number of horses and burros lost by each or by all.

11. In awarding damages for consequential losses and inconveniences.

12. In awarding damages for mental pain and suffering.

13. In awarding $100,000 to the plaintiffs against the United States.

14. In finding, without basis in the evidence or reasonable inference from the evidence, that it was the motive of the agents and employees of the United States, both alone and in concert with white livestock operators, to harass and molest the Indians and to kill their animals so that they would be compelled to leave the range and could no longer assert a right to use the area in question.

15. In finding that the agents and employees of the United States had harassed and molested the Indians since 1946.

16. In making a single lump sum award to all plaintiffs for the total damages which without findings or conclusions [fol. 4] as to the items or amounts of specific damages, may include awards for damages not allowed by law.

17. In awarding punitive damages against the United States.

18. In excluding evidence of the sale price of horses on the adjacent Indian reservations.

19. In unduly restricting the Government's evidence of

value while liberally admitting all of the plaintiffs' evidence of value.

20. In excluding witnesses for the Government from the courtroom.

21. In prohibiting witnesses for the Government from discussing the case among themselves or with anyone, including counsel for the Government.

22. In exhibiting and being influenced by an unwarrantedly prejudiced attitude from the outset of the trial against the case which the United States sought to present and against the officers, agents and employees of the United States who participated in the facts leading to the suit and at the trial of suit.

Injunction

1. In assuming jurisdiction to enjoin the United States in the absence of any statute conferring such jurisdiction upon the courts.

2. In assuming jurisdiction to try title to land, claimed and administered by the United States as a part of the public domain, in a suit against the United States under the Federal Tort Claims Act, 28 U.S.C. Secs. 1346(b) and 2671-2680, and to enjoin the United States and its agents and employees from the conduct of its business on such land, pending the determination of title, where plaintiffs' claims were restricted to tort relief and no injunction was asked for.

3. In issuing and continuing an injunction against the United States and its agents and employees which has resulted and will result in irreparable injury to the United States in the administration of its lands and to citizens of the United States who have legal rights or interests in the [fol. 5] public lands in question pursuant to the laws and regulations of the United States.

4. In issuing and continuing an injunction against the United States and its agents and employees without provision to indemnify the United States against damages which will ensue as a consequence and where the damages are of such character and extent that they cannot be adequately indemnified by surety bond.

5. In issuing and continuing an injunction against the United States and its agents and employees where the irreparable injury and damages to the United States far out-

weigh any conceivable advantage that could inure to plaintiffs as a result of the continuance in force of the injunction.

Dated at Washington, D. C., July 9, 1954.

United States of America, Appellant, By: Perry W. Morton, Assistant Attorney General. Roger P. Marquis, S. Billingsley Hill, Attorneys, Department of Justice, Washington, D. C.

Filed July 12, 1954.

[fol. 6] IN THE UNITED STATES DISTRICT COURT FOR THE DISTRICT COURT OF UTAH, CENTRAL DIVISION

BILL HATAHLEY, WIDOW SLEEPY, CHARLIE BURKE, LUCY HARVEY, Shorty Smiles, Natona Begay, Mark Tootsonian, Mary Jay, John Jay, Frank Joe, Danny Jones, Jim Antez, Cyrus Begay, Allen Ben, Willie Harvey, Tom Jones, Hosteen Sakezzie, Fred Johnson, Jim Hatahley, Billy Antez, Little Wagon, Tom Mustash, Slim Todachennie, Mary's Boy, Eddie Nockie, Susie Sleepy, Mrs. Lilly Thomas, Jim Harvey, Tom's Father, and Tom Belatso, Plaintiffs,

vs.

UNITED STATES OF AMERICA, Defendant

No. 36-53.—Civil

COMPLAINT—Filed March 20, 1953

Come now the plaintiffs and for cause of action against defendant allege:

I. Plaintiffs are Navajo Indians, wards of the United States of America, and have had their homes and have lived upon and have grazed their horses and other livestock within the range land area herein concerned for time beyond the memory of man, and hold aboriginal rights to the use and possession of said area.

II. That the amount in controversy in this action, exclusive of interest and costs, is a sum in excess of $3,000.00.

III. That this action arises under the Act of Congress,

Public Law 773 (H.R. 3214) approved June 25, 1948; U.S. Code, Title 28, Section 1346 (b).

IV That one of the departments of the defendant is the [fol. 7] Department of the Interior. That H. Byron Mock is an employee of defendant, being Regional Administrator in charge of and supervisor over all agents and employees of defendant in the administration of public domain lands in the States of Utah and Colorado. That Kelso P. Newman is an employee of the defendant, employed under the title of Regional Manager of the Division of Range Management, Department of the Interior, under the supervision of the said H. Byron Mock. That Dale H. Kinnaman is employed within the same department under the supervision of the two aforesaid employees, being employed as Range Manager of a subdivision of the public domain which includes the land area herein concerned. That Dee P. Black is likewise employed by the said Department of the defendant as a Range Aide under the supervision of all of the aforesaid three employees of the defendant and under the direct supervision of the said Dale H. Kinnaman in the administration of the public domain within the area involved herein. Said agents and officers are regular and full-time employees of the defendant.

V. That the acts of which plaintiffs herein complain were committed within that area bounded on the south by the north boundary of the Navajo Indian Reservation, on the east by the Colorado-Utah state line, on the north by the line extending along the north side of Township 37 South, Salt Lake Meridian, and on the west by the west line of Range 18 East, Salt Lake Meridian.

VI. Said officers and agents of defendant wrongfully and unlawfully seized possession of 35 burros and 115 horses belonging to plaintiffs, and which said agents then knew and had known for several years to be the property of plaintiffs and all of which animals were plainly marked and branded and in the actual possession and use of plaintiffs. That plaintiffs contacted defendant's agents on many occasions after the different bands of their said animals had been seized and requested said agents to surrender back to plaintiffs the possession of their horses and burros, but said agents refused to surrender these animals to plaintiffs but killed some of the said animals upon the range, and the re-

mainder they shipped out of the range area concerned and out of San Juan County, Utah, and plaintiffs believe, and [fol. 8] allege on information and belief, that said agents of defendant caused these animals to be killed. That the said agents of defendant also collaborated with certain white men in the doing of the acts above alleged and commanded, directed, advised, encouraged, instigated, promoted, aided and abetted said white men in the doing of said acts.

VII. That the acts above alleged committed by defendant's said officers and agents are a part of a plan which has been in the process of operation by defendant for the past five years or more designed by defendant to harass and injure plaintiffs, to deprive them of their livestock and of the means of taking care of their livestock, to drive them off their ancestral homes and ranges, to take from them their only means of earning a livelihood, and to reduce them to a condition of helplessness and extreme want, so that plaintiffs will quit and surrender up possession and use of the land area herein concerned in order that all of the forage upon these public domain lands may be made and kept available for the exclusive use of the said white men.

VIII. As a direct and proximate result of the said acts on the part of defendant's said agents, plaintiffs have been subjected to extreme fear and worry, their means of properly taking care of their small flocks and herds of sheep and cattle have been taken from them; plaintiffs have been grievously harassed, distressed, persecuted and troubled, and have been reduced to acute and shameful want. All of the acts herein complained of occurred within one year from the filing of this complaint, and said acts were wrongful, unlawful and inequitable and have caused the plaintiffs damage in the sum of $100,000.00, and for the recovery of which plaintiffs have been required to employ counsel.

Wherefore, plaintiffs pray judgement as follows:

That plaintiffs be awarded damages against defendant in the sum of $100,000.00; for their costs of court, and counsel fees and for such other and further relief as may be just in the premises.

Milton A. Oman, Attorney for Plaintiffs.

Filed March 20, 1953.

[fol. 9] IN UNITED STATES DISTRICT COURT

MOTION TO DISMISS AND MOTION FOR A MORE DEFINITE STATEMENT—Filed May 14, 1953

Pursuant to Rule 12-E, Federal Rules of Civil Procedure, comes now the defendant, United States of America, and moves to dismiss the above entitled cause on the ground and for the reason that the same does not state a cause of action against the United States.

The defendant United States of America, in accordance with the provisions of Rule 12-E, Federal Rules of Civil Procedure, moves this court to require the plaintiffs to furnish a more definite statement of their alleged cause of action against the United States of America. Said complaint on file herein is defective in that it fails to allege any date or period of time in which the acts alleged for a cause of action against the defendant took place. Said complaint is further defective for the reason that it fails to state whether these alleged burros and horses were jointly owned by the several named plaintiffs or whether they are individually owned by the various individuals named as plaintiffs and if individually owned as to which plaintiff owned which animal. Said complaint is further defective in that it fails to allege the names of the plaintiffs who contacted the said agents of the defendant and the complaint further fails to allege what if any agents were contacted by the plaintiffs.

The complaint is further defective in that it attempts to allege a conspiracy on the part of the defendant with other persons to harass and injure the plaintiffs without alleging what individuals took part in said alleged plan or conspiracy or what agents of the defendant were parties to said plan or conspiracy.

Dated this 14th day of May, 1953.

Scott M. Matheson, United States Attorney, H. D. Lowry, Assistant United States Attorney.

Filed with proof of service, May 14, 1953.

[fol. 10] IN UNITED STATES DISTRICT COURT

MINUTE ENTRY DENYING MOTIONS TO DISMISS AND FOR MORE DEFINITE STATEMENT—June 13, 1953

On June 13, 1953, the court heard the defendant's motion to dismiss and motion for a more definite statement, and denied both motions.

Mr. Milton A. Oman represented the plaintiffs and Mr. H. D. Lowry represented the defendant.

IN UNITED STATES DISTRICT COURT

AMENDED ANSWER—Filed November 17, 1953

Comes now the defendant, United States of America, in the above entitled matter, and for its Amended Answer to the complaint on file herein admits, denies and alleges as follows, to-wit:

1. In answer to paragraph 1 of plaintiffs' complaint, defendant denies the allegations contained therein.

2. In answer to paragraph 2 of plaintiffs' complaint, defendant denies the allegations contained therein.

3. In answer to paragraph 3 of plaintiffs' complaint, defendant alleges that the same is a conclusion of law.

4. In answer to paragraphs 4 and 5 of plaintiffs' complaint, defendant admits the allegations contained therein.

5. In answer to paragraph 6 of plaintiffs' complaint, defendant denies each and every allegation contained therein.

6. In answer to paragraph 7 of plaintiffs' complaint, defendant denies the allegations contained therein.

7. In answer to paragraph 8 of plaintiffs' complaint, defendant denies the allegations contained therein.

Further answering said complaint, and as an additional defense thereto, defendant alleges as follows:

1. That said complaint fails to state a claim upon which relief may be granted.

2. The Laws of Utah provide, and did provide, as follows:

Title 3, Chapter 5, Section 115, Utah Code Annotated 1943:

[fol. 11] Title 4, Chapter 13, Section 3; Utah Code Annotated 1953:

"Brands—Recording. Every livestock owner who allows his livestock over six months of age to range upon the open range or without an enclosure, shall have and adopt a brand and shall brand his livestock with such brand, which brand must be recorded in the office of the state board of agriculture."

Title 2, Chapter 5, Section 116, Utah Code Annotated 1943:

Title 4, Chapter 13, Section 4, Utah Code Annotated 1953:

"Unlawful to use unrecorded brand, or to disfigure or remove brand—It is unlawful to brand and mark any livestock in this state with a brand and mark unless such brand and mark is recorded.

It is unlawful for any person to obliterate, disfigure, extend, add to, deface or remove a recorded brand or mark."

Title 64, Chapter 2, Section 1, Utah Code Annotated 1943:

Title 47, Chapter 2, Section 1, Utah Code Annotated 1953:

"'Abandoned horse' defined—The term 'abandoned horse' as used in this chapter means any horse, ass, mule or other animal of the genus equus, unbranded, or, if branded, that has escaped assessment for taxation for the year next preceding the killing of such animal as hereinafter provided for, and running at large upon the open range of this state, and includes a foal running with a dam coming within the above definition. An animal not bearing a decipherable brand recorded in the office of the recorder of marks and brands shall be deemed unbranded."

Title 64, Chapter 2, Section 2, Utah Code Annotated 1943:

Title 47, Chapter 2, Section 2, Utah Code Annotated 1953:

"'Open range' defined—The term 'open range' means all land not privately owned, and includes all roads, outside of private inclosures, used by the public, whether the same have been formally dedicated to the public or not."

[fol. 12] Title 64, Chapter 2, Section 3, Utah Code Annotated 1943:

Title 47, Chapter 2, Section 3, Utah Code Annotated 1953:

"Abandoned horses on open range, a nuisance—It shall be unlawful for any person to suffer or permit any abandoned horse to run at large upon the open range, and every abandoned horse is declared to be a public nuisance and a public menace, and is condemned subject to the right of its owner to reclaim it under the conditions hereinafter provided."

Title 64, Chapter 2, Section 4, Utah Code Annotated 1943:

Title 47, Chapter 2, Section 4, Utah Code Annotated 1953:

"Elimination by county commissioners—Notice of intention. The boards of county commissioners may provide for the elimination of abandoned horses in the respective counties in the following manner:

They shall cause notice to be published at least once a week for three successive weeks in some newspaper of general circulation published in the county, and such notice shall also be posted in at least five public places outside of the county seat on public highways in such county, and in three public places at the county seat, one of which shall be at the front door of the court house. The notices posted outside of the county seat shall be posted not less than two miles apart, and all posted notices shall be posted at least thirty days before the date which the county commissioner shall fix for the beginning of the elimination of abandoned

horses from the range in such county as hereinafter provided. If no newspaper is published in the county, publication in a newspaper shall not be required.

Such notice shall be substantially in the following form:

Notice is hereby given that in accordance with the provisions of law the board of county commissioners of — County, Utah, will proceed to eliminate abandoned horses from the open range in said county, and that beginning on the — day of —, 19—, a drive will be held, and all abandoned horses running upon the open range will, under the [fol. 13] direction and supervision of the county commissioners, be eliminated. All owners of horses running upon the open range are hereby given notice to file with the board of county commissioners a description of such horses, and the brands or marks thereon.

Dated this — day of —, 19—.

By order of the board of county commissioners of — County, Utah.

——, County Clerk."

Title 64, Chapter 2, Section 5, Utah Code Annotated 1943:

Title 47, Chapter 2, Section 5, Utah Code Annotated 1953:

"Elimination by county commissioners—Method—The manner and method of eliminating abandoned horses from the open range shall be in the discretion of the board of county commissioners, and it shall be its duty to so eliminate abandoned horses, using the means most effective and economical under the circumstances. The board may, in its discretion, sell all captured horses."

That pursuant to the statutes of the State of Utah, the County Commissioners of San Juan County on the 9th day of July, 1952, by resolution directed the Advisory Board of the Monticello Grazing District, which grazing district covers the lands described in plaintiff's complaint, paragraph 5, on file herein, to remove all of the abandoned horses found on said public lands and the said County Commissioners caused to be published a notice in the San Juan

Record, a newspaper of general circulation, published in San Juan County, Utah, said notice being as follows:

"Notice of Elimination of Abandoned Horses

Notice is hereby given that in accordance with the provisions of law the Board of County Commissioners, San Juan County, Utah, will proceed to eliminate abandoned horses from the open range in said County, and that beginning on the tenth day of August, 1952, a drive will be held and all abandoned horses running upon open range will, under the direction and supervision of the County Commissioners, be eliminated.

[fol. 14] All owners of horses running upon the open range are hereby given notice to file with the Board of County Commissioners within thirty (30) days from the date given below, a description of such horses and the brands and marks thereon.

Dated this tenth day of July, 1952.

By order of the Board of County Commissioners of San Juan County, Utah.

Signed Pearl Butt, County Clerk.

First pub. July 10, 1952.

Last pub. Aug. 8, 1952."

That in addition to publication in the San Juan Record, notices were posted outside the county seat in five public places, as provided by the statutes.

3. That pursuant to the resolution of the County Commissioners, and the notice heretofore referred to, the defendant, in accordance with its duties to conserve and manage the range in the lands described in the plaintiffs' complaint, undertook the round-up of the abandoned horses and burros grazing upon said open range and that they did take into their possession as the result of said round-up a number of unbranded horses and burros and that no claim was made for said horses and that the same were disposed of by the defendant, pursuant to the statutes of the State of Utah.

Wherefore, having fully answered the defendant prays

that the said action be dismissed and that the defendant have its costs.

A. Pratt Kesler, United States Attorney. Llewellyn O. Thomas, Assistant United States Attorney. Attorneys for Defendant.

Filed with proof of service, Nov. 17, 1953.

[fol. 15] IN UNITED STATES DISTRICT COURT

PRETRIAL ORDER—Filed July 13, 1953

This cause coming on for pretrial on July 10, 1953, Mr. Milton A. Oman appearing for plaintiffs, and Mr. H. D. Lowry, Assistant United States Attorney, for the defendant,

Now therefore, upon the statements of counsel for the respective parties as to the issues of law and fact to be tried, the following summary of said issues is hereby made and ordered filed herein, to-wit:

(1) Whether or not there has been wilful and malicious destruction, or deprivation of possession for a period of time, of the horses and burros of the Indians by agents and employees of the United States Government.

(2) Whether or not the agents and employees of the United States had legal justification, in the destruction or deprivation of possession of said horses and burros of the Indians, arising out of the manner in which they cooperated with the County Commissioners under the State statutes.

(3) Wnether or not the employees of the Bureau of Land Management, in the destruction or deprivation of possession of the said horses and burros, were in the exercise of a discretionary function, within the exception of the Tort Claims Act.

(4) What, if any, damages the plaintiffs are entitled to recover herein.

Willis W. Ritter, United States District Judge.

Filed July 13, 1953.

In United States District Court

Motion for Summary Judgment—Filed September 11, 1953

Comes now the defendant, United States of America, by and through A. Pratt Kesler, United States Attorney for the District of Utah and H. D. Lowry, Assistant United States Attorney for said District, and hereby moves the court to enter a summary judgment for the defendant in accordance with the provisions of 56 (b) and (c) of the Federal Rules of Civil Procedure on the grounds that the [fol. 16] pleadings and affidavit of Dale Herbert Kinnaman attached hereto show that the defendant is entitled to a judgment as a matter of law upon the following ground and for the following reason:

1. That this action is barred by reason of the provisions of Title 28, Section 2680, sub-paragraph (a), United States Code Annotated.

Dated this 11th day of September, 1953.

A. Pratt Kesler, United States Attorney, H. D. Lowry, Asst. United States Attorney.

Filed with proof of service Sept. 11, 1953.

Affidavit in Support of Motion

State of Utah,
County of Salt Lake, ss.

Dale Herbert Kinnaman, being first duly sworn, on oath, deposes and says:

That he is employed by the United States of America as Range Manager in charge of Grand and Monticello Grazing Districts, which districts include grazing district known as "Utah Grazing District No. 6", and that he was such Manager at all times mentioned in the plaintiffs' complaint on file herein.

That as District Grazing Range Manager he has charge of enforcing the provisions of the Taylor Grazing Act, 43 U.S.C.A., Sec. 315, which statutes provide that the Secre-

tary of the Interior is authorized to establish grazing districts and promulgate rules and regulations for the protection and administration of such grazing districts.

Rules and regulations were promulgated by the Secretary of the Interior for said protection and administration, regulation and improvement of said grazing districts. Said regulations are known as the "Federal Range Code for Grazing Districts" and are contained in Title 43 of the Code of Federal Regulations, part 161.

[fol. 17] These regulations, inter alia, prohibit the grazing of livestock upon the Federal range without appropriate license or permit.

The plaintiffs in this action held no license or permit to graze livestock on the Federal range described in the plaintiffs' complaint and which lies in grazing district known as Utah No. 6.

That with the exception of the privately owned lands, or State owned lands, all lands described in paragraph 5 of plaintiffs' complaint are Federal lands located in Federal Grazing District, Utah No. 6, under the administration of the Bureau of Land Management and your affiant, Dale Herbert Kinnarian, as agent.

As Range Manager, it was the duty of affiant to enforce the rules and regulations contained in the Federal Range Code for grazing districts, including the duty to remove livestock from the Federal range grazing there without an appropriate license or permit to graze thereon and the Range Manager is authorized under the provisions of the Federal Range Code to exercise the proprietary rights of the United States in the Federal range under local impoundment law and procedure.

The livestock alleged to have been owned by the plaintiffs in this action and alleged to have been seized and removed by the defendant, were trespassing animals and were seized and removed by affiant and under his direction as Range Manager under local impoundment laws and procedure as authorized by the Federal Range Code and in accordance with the provisions of Title 4, Chapter 13 and Title 47, Chapter 2, Utah Code Annotated 1953.

That all of the livestock alleged by the plaintiffs to have been owned by the plaintiffs and alleged to have been seized

and removed by the defendant from the Federal range were either unbranded or bore brands which were unrecorded, as provided in the Utah Code Annotated 1953, Title 4, Chapter 13.

That due notice of the elimination of the trespassing livestock as described in the plaintiffs' complaint on the Fed- [fol. 18] eral range was given in accordance with the provisions of Title 47, Chapter 2, Utah Code Annotated 1953.

That all trespassing livestock removed from the public domain, and particularly the land within the grazing district known as "Utah No. 6", as described in the plaintiffs' complaint, were removed by affiant or under his direction, in accordance with his duties as Range Manager of the grazing district and in accordance with the provisions of the Utah statutes governing trespassing and abandoned horses and animals. That none of the animals described in the plaintiffs' complaint were claimed or redeemed in accordance with the provisions of the Utah statutes.

Dale Herbert Kinnaman.

Subscribed and sworn to before me this 11th day of September, 1953. Lucy S. Taylor, Notary Public, Residing at Bountiful, Utah. My Commission expires October 16, 1956. (Seal.)

Filed Sept. 11, 1953.

In United States District Court

Minute Entry, Denying Motion for Summary Judgment

This matter came on for hearing on September 18, 1953, upon defendant's motion for summary judgment. The plaintiff was represented by Milton Oman and the defendant was represented by H. D. Lowry, assistant United States attorney.

After listening to the arguments of counsel and being fully advised, the court denied motion for summary judgment.

This case is on the non-jury calendar after the jury cases.

[fol. 19] IN UNITED STATES DISTRICT COURT

DIRECTION TO ENTER JUDGMENT—November 25, 1953

To the Clerk: Enter judgment in the above-entitled case. For Plaintiffs.

Willis W. Ritter, U. S. District Judge.

Date: November 25, 1953.

Filed Nov. 25, 1953.

IN UNITED STATES DISTRICT COURT

Findings of Fact and Conclusions of Law—January 22, 1954

This matter coming on regularly for hearing before the Court without a jury on November 17, 18, 19, 20 and 21, 1953, plaintiffs appearing in person and by their attorney, Milton A. Oman, and defendant appearing by A. Pratt Kesler, United States Attorney for the District of Utah, and Llewellyn O. Thomas, Assistant United States Attorney for said District, and the Court having heard evidence in support of plaintiffs' Complaint and of defendant's Answer, and the arguments of counsel, and being fully advised, and the case being submitted, the Court now makes and enters the following:

FINDINGS OF FACT

Liability

1. The Court finds that plaintiffs are Navajo Indians, wards of the United States of America, and have with their ancestors, had their homes and have lived upon and have grazed their horses and other livestock within the range land area herein concerned for time beyond the memory of man.

2. That this action was brought under the provisions of the Federal Tort Claims Act, as amended, 28 U. S. C. A., Sec. 1346 (b), for money damages resulting to plaintiffs for

the killing by defendant of 150 head of horses and burros belonging to plaintiffs.

3. That the Bureau of Land Management is an agency of defendant created to administer and regulate, under the provisions of the Taylor Grazing Act, the grazing use of [fol. 20] lands owned by defendant. Prior to the enactment of the Taylor Grazing Act 43 U. S. C. A., Sec. 315-315 (q) on June 28, 1934, the use of the public domain was not regulated or controlled by defendant and its grazing use was free to the public. The said act provides in part as follows:

Sec. 315 "In order to promote the highest use of the public lands pending its final disposal, the Secretary of the Interior is authorized, in his discretion, by order to establish grazing districts or additions thereto and/or to modify the boundaries thereof, not exceeding in the aggregate an area of one hundred and forty-two million acres of vacant, unappropriated, and unreserved lands from any part of the public domain of the United States . . ."

Sec. 315 (a) "The Secretary of the Interior shall make provision for the protection, administration, regulation, and improvement of such grazing districts as may be created under the authority of Section 315 of this title, and he shall make such rules and regulations and establish such service, enter into such cooperative agreements, and do any and all things necessary to accomplish the purposes of this Chapter and to insure the objects of such grazing districts, namely, to regulate their occupancy and use, to preserve the land and its resources from destruction or unnecessary injury, to provide for the orderly use, improvement and development of the range; . . . and any wilful violation of the provisions of this Chapter or of such rules and regulations thereunder after actual notice thereof shall be punishable by a fine of not more than $500.00."

Sec. 315 (b) "The Secretary of the Interior is authorized to issue or cause to be issued permits to graze livestock on such grazing districts to such bona fide settlers, residents, and other stock owners as under his rules and regulations are entitled to participate in the use of the range . . ."

Acting under the provisions of the above said Taylor Grazing Act, the Secretary of the Interior withdrew from

entry, and from unregulated use by the public, the public domain located in San Juan County, Utah, which is in the southeast corner of the State of Utah, and established in 1935 a grazing district which included all of said public domain and designated as Utah Grazing District No. 6. The [fol. 21] lands involved in this action are a small part of the public domain within said grazing district, in the southeast corner thereof, adjoining on the north the Navajo Indian Reservation, and extending thence northerly along the Colorado-Utah state line to the Township line between Township 36 South and Township 37 South, Salt Lake Meridian, thence westerly to the Range line between Ranges 17 and 18 East, SLM., thence in a southerly direction to the north boundary of said Navajo Reservation. Practically all of the lands in this area are public lands, or lands which have not passed into private or State ownership. The lands in this area are comparatively low elevation, unenclosed lands, a desert area, with very little water and very sparse vegetation.

4. Immediately after the said grazing district was established the defendant began the issuance of permits to white livestock operators authorizing them to graze livestock upon all of the public domain therein, including the lands concerned herein, and determined the class of livestock which could be grazed on these public lands, the numbers which could be grazed, where they could graze, and fixed the seasons during which the range could be grazed, and collected fees from said permittees for the use permitted to be made of the range. At least for the period of time involved in this action, the defendant had refused to grant to plaintiffs any permits for the use of any of these public lands.

5. The Secretary promulgated a set of rules and regulations known as the Federal Range Code, 43 C. F. R. 161.1 et seq., to be used as a guide in the determination of the qualifications of applicants for permits to graze the public lands under the provisions of the Taylor Grazing Act, which provided procedures to be followed in filing applications for the issuance of permits, providing for the election from among the permittees of a group of local stockmen, known as an Advisory Board, the functions of which is to offer sugges-

tions and advice to the defendant as to what applicants should be granted permits, and in general to advise in the management of the grazing district from which they are elected. Among the provisions of the said Federal Range Code, governing action to be taken for an unauthorized use of the public lands within grazing districts is the following:

[fol. 22] "161.11 Procedure for enforcement of rules and regulations.

(a) Service of notice. Whenever it appears that there has been any willful violation of any provision of the act or of the Federal Range Code for Grazing Districts, the range Manager will cause the alleged violator and any interested lien holder who has filed notice of his lien with the Bureau of Land Management to be served with a written notice, which will set forth the act or acts constituting such violation and in which reference will be made to the provision or provisions of the act or the Federal Range Code for Grazing Districts alleged to have been violated. Such notice may be served in person or by registered mail and the affidavit of the person making personal service or the registry receipt shall be preserved.

(b) Unlawful grazing on Federal range; removal of livestock; impoundment. Whenever the charge consists of unlawfully grazing livestock on the Federal range, the notice served on the alleged violator and any interested lien holder who has filed notice of the lien with the Bureau of Land Management will order the alleged violator to remove the livestock or to cause them to be removed immediately or within such reasonable time as may be specified. If the alleged violator fails to comply with the notice the range manager may proceed to exercise the proprietary right of the United States in the Federal range, under local impoundment law and procedure, if practicable; otherwise he may refer the matter through the usual channels for appropriate legal action by the United States against the violator.

161.16 Penal provision. Under Section 2 of the act any willful violation of the provisions of the act or of the rules and regulation thereunder (the Federal Range Code for Grazing Districts), after actual notice of the existence of the provisions of such act or such rules and regulations, is pun-

ishable by a fine of not more than $500.00. (Sec. 2, 48 Stat. 1270; 43 U. S. C. 315a)."

6. The State of Utah statute enacted in the year 1927, prior to the enactment by the Congress of the United States of the Taylor Grazing Act, providing for the elimination [fol. 23] from public lands of wild, unowned or abandoned horses, the provisions of which are as follows:

Title 64, Chapter 2, Section 1, Utah Code Annotated 1943:

Title 47, Chapter 2, Section 1, Utah Code Annotated 1953:

"'Abandoned horse' defined.—The term 'abandoned horse' as used in this chapter means any horse, ass, mule or other animal of the genus equus, unbranded, or, if branded, that has escaped assessment for taxation for the year next preceding the killing of such animal as hereinafter provided for, and running at large upon the open range of this state, and includes a foal running with a dam coming within the above definition. An animal not bearing a decipherable brand recorded in the office of the recorder of marks and brands shall be deemed unbranded."

Title 64, Chapter 2, Section 2, Utah Code Annotated 1943:

Title 47, Chapter 2, Section 2, Utah Code Annotated 1953:

"'Open range' defined.—The term 'open range' means all land not privately owned, and includes all roads, outside of private inclosures, used by the public, whether the same have been formally dedicated to the public or not."

Title 64, Chapter 2, Section 3, Utah Code Annotated 1943:

Title 47, Chapter 2, Section 3, Utah Code Annotated 1953:

"Abandoned horses on open range, a nuisance.—It shall be unlawful for any person to suffer or permit any abandoned horse to run at large upon the open range, and every abandoned horse is declared to be a public nuisance and a public menace, and is condemned subject to the right of its owner to reclaim it under the conditions hereinafter provided."

Title 64, Chapter 2, Section 4, Utah Code Annotated 1943:

Title 47, Chapter 2, Section 4, Utah Code Annotated 1953:

"Elimination by county commissioners—Notice of intention. The boards of county commissioners may provide for

the elimination of abandoned horses in the respective counties in the following manner:

[fol. 24] "They shall cause notice to be published at least once a week for three successive weeks in some newspaper of general circulation published in the county, and such notice shall also be posted in at least five public places outside of the county seat on public highways in such county, and in three public places at the county seat, one of which shall be at the front door of the court house. The notices posted outside of the county seat shall be posted not less than two miles apart, and all posted notices shall be posted at least thirty days before the date which the county commissioners shall fix for the beginning of the elimination of abandoned horses from the range in such county as hereinafter provided. If no newspaper is published in the county, publication in a newspaper shall not be required.

"Such notice shall be substantially in the following form:

"Notice is hereby given that in accordance with the provisions of law the board of county commissioners of — County, Utah, will proceed to eliminate abandoned horses from the open range in said county, and that beginning on the — day of —, 19—, a drive will be held, and all abandoned horses running upon the open range will, under the direction and supervision of the county commissioners, be eliminated. All owners of horses running upon the open range are hereby given notice to file with the board of county commissioners a description of such horses, and the brands or marks thereon.

"Dated this — day of —, 19—.

"By order of the board of county commissioners of — County, Utah.

——— ———, County, Clerk."

Title 64, Chapter 2, Section 5, Utah Code Annotated 1943:

Title 47, Chapter 2, Section 5, Utah Code Annotated 1953:

"Elimination by county commissioners—Method—The manner and method of eliminating abandoned horses from the open range shall be in the discretion of the board of county commissioners, and it shall be its duty to so eliminate

abandoned horses, using the means most effective and eco-
[fol. 25] nomical under the circumstances. The board may, in its discretion, sell all captured horses."

7. That one of the executive departments of defendant is the Department of the Interior, and one of the bureaus of said Department is the Bureau of Land Management which manages public land problems under the Taylor Grazing Act; that Dale Herbert Kinnaman is an employee of defendant in said Bureau and Department with offices at Monticello, San Juan County, Utah, employed as Range Manager in direct charge of supervising the grazing use of public lands within Utah Grazing District No. 6; that Dee P. Black and Robert C. Krumm are employees of defendant in said Department, Bureau and District under the direct supervision of the said Dale Herbert Kinnaman; and that Kelso P. Newman and H. Byron Mock are likewise employees of the defendant within said Department and Bureau with offices in Salt Lake City, Utah, and they are the supervisory officers directing the activities of the said three employees in Utah Grazing District No. 6, as well as of all Bureau of Land Management employees within the State of Utah, having to do with grazing management of the public lands in said State.

8. That plaintiffs are herdsmen and have for time immemorial, owned and grazed cattle, horses, sheep and goats within the area above described, the meat, wool and hides from which animals they used and together with small amounts of corn which they raised therein, and pine nuts which they gathered therefrom and from surrounding areas, and with the meat and hides they secured from deer and other wild game, they always have and now make their entire living. That the services of horses are required continuously by plaintiffs in order to enable them to live in their accustomed primitive way in the remote and rugged country which has been their home as hereinbefore set forth; that plaintiffs have no other home.

9. That by reason of the methods of making a living, the important practical uses to which a horse or burro is put in the daily activities of plaintiffs and their families, and by reason of the religious esteem in which plaintiffs and the Navajo Indians place their horses, these animals and their
[fol. 26] possession and use are prized by them above all

earthly property, and they are very important and necessary to plaintiffs, not only to make it possible to survive in the remote and sparsely covered range land to which they are confined, but horses and burros are essential in the religious and spiritual growth of plaintiffs and their families, and to all of the members thereof from the time shortly after a child is born and down to the time of its death; that the purpose of life for plaintiffs and for their children is very largly built around and is directly connected with their horses, and their success and position in this life and in the spiritual world which they contemplate is measured in terms of the possession, and use which they make of horses during their entire life and upon their being able to take the best horse they own with them into death; their growth, their physical and spiritual development requires the continuous raising, breaking, developing, training, and use of horses and burros, which has been their custom since a time before their contact with white men in this area.

10. That plaintiffs require and have always used the services of horses in tilling their limited acreages of dry land corn, in hauling and carrying water, wood and supplies to their hogans and camps, in transporting all members of the family to and from the pinon tree areas from which pine nuts are regularly gathered, and in taking the family to and from schools, trading posts, religious ceremonies, business, recreational, council and social meetings and functions, in carrying sick and injured members of plaintiffs' families from remote camp or range areas out to their trading post or to roads from which they can be taken by automobile to hospitals, in carrying Navajo doctors and medicine men into camps when their services are required, in herding, gathering and caring for their livstock upon the range, in moving their camps from place to place throughout the range as the movements of their livestock continually require, and for many other important purposes. The horse is their only means of transportation, and is their beast of burden.

11. That the life of plaintiffs in their desert land is a continuous life of extreme hardship; the problems of keeping themselves supplied with adequate food are always very [fol. 27] serious; their income is very meager with which to buy essential articles of clothing. These people depend upon the grasses and feeds which the soil naturally yields

for their livestock; they cultivate no fields except for very small patches of their native corn planted in little plots of choice earth out in the range, and the grasses and other plants in turn depend upon the quantity of moisture which falls at appropriate times to benefit plant growth. When the grasses have been particularly short, or the winters particularly severe, or where both such conditions exist other food becomes scarce or non-existent, and under these extreme conditions the plaintiffs kill and eat horses until such a time as other food becomes available. So while the horse is used in carrying plaintiffs and their families, in performing their daily work, and is held sacred by them as a means through which they develop in their religious and spiritual considerations, it also is depended upon, in conditions of last resort, to furnish its flesh as food for plaintiffs' familiies.

12. The earthly lives of plaintiffs is interwoven with the animals, horses, burros, cattle, sheep and goats; and it is these properties by and from which they live, and they constitute the measure of their security. The horse above all other animals is most valued because without him the other animals cannot be kept under control, herded, gathered, and grazed in the open ranges. The horse is also the most apt to survive any extreme harsh range conditions, and alone can carry plaintiffs and their families to places of safety.

13. Wood is the only fuel available to plaintiffs as a fuel for their fires, and it is necessary at certain times to travel by horse up to 15 or 20 miles to drag or haul wood to the camps or hogans. Water is also scarce and this must be carried by horse and burro for distances up to 10 miles from the camps. Trips to reach the pine nuts areas often requires trips by horse for 150 miles, and to reach sites of certain ceremonies and other functions among the Navajo people often require plaintiffs and their families to travel on their horses for 150 miles. Seventy-five mile trips are required in their hunting expeditions which can only be done on horses. That the same use is made of burros as of horses [fol. 28] by plaintiffs and the burro is held in the same esteem by them as are horses.

14. When a child is about 5 years of age he is considered old enough to begin riding horses alone and to be able to begin the training and care of horses. In this life with

horses the child continues throughout his life, developing a knowledge and understanding of, and love and esteem for his horse and burros. Plaintiffs kill the best horse which has been owned or assigned to one of their people at the time of his or her death, and the horse is placed over the grave of the deceased, in order that the spirit of the horse may accompany its master into the life hereafter, where the two will, according to their belief, take up their existence together, and an Indian in the spirit life without a horse is disgraced among his people and is believed faced with a servile and very undesirable life of continuous hardship.

15. Plaintiffs speak only the Navajo language, which is an unwritten language, and their horses understand this language and respond to and obey Navajo words. These horses understand the words of no other language. Plaintiffs do not sell nor trade their horses to other than their own people. That plaintiffs' horses are bred out of Indian stock from time immemorial; that these horses have come from stock which was raised upon the area here in question, and were themselves raised in that area; that said horses and the breed from which they came had been subjected to severe tests, trials and training, to breed and develop into them an unusual ability to survive while carrying heavy burdens long distances for up to three days without feed or water, and to then be able to forage for themselves upon the range to find sufficient feed and water upon which to survive in the dry and desolate desert which is their home; that plaintiffs have no cultivated lands for the production of hay or grain with which to feed their horses or other livestock, and a horse raised upon such feeds cannot survive upon the sparse vegetation in the area here in question, nor upon the adjacent Navajo Indian Reservation lands; that the horses and burros here involved have been bred, developed and trained to understand and respond alone to the [fol. 29] Navajo language and signs; that no other horse is so developed and trained; that the raising, breeding and training of these horses and burros in the area in which they could be used has made them as unique among horses to meet the needs of their master and his family as is the Indian himself, among men, able to withstand the want, privation, and severe life to which he is subjected; that not less than five years will be required to replace said horses.

16. That the horses and burros of plaintiffs are so carefully broken and have become so gentle through their trials and training that they will safely carry very young children and very old men and women from place to place. These horses may be called and guided by beckons, signs and movements, and calls which are peculiar in their training.

17. That the plaintiffs and their families, with their livestock, were living within the area herein concerned when the Taylor Grazing Act was enacted, and when the defendant first began to regulate the use of these public lands under the provisions of said act; that the plaintiffs were thusly occupying these lands, as they had done for many generations, when the first permits were issued by defendant to white livestock operators authorizing them to graze these same public lands; that since said time and down to the time of the commission by defendant of the acts of which plaintiffs herein complain the livestock of the said white men have been grazed in common on the same range with the livestock owned and operated by plaintiffs; that the defendant's said agents knew of the occupancy by plaintiffs of these said lands for all of said time, and had seen plaintiffs living in their permanently built timber and mud hogans in this area, and had seen on many occasions their horses and other livestock grazing on this range; that defendant's agents and employees had been advised on many occasions since the beginning of administration and regulation of these lands under the provisions of the Taylor Grazing Act, by or on behalf of plaintiffs that they claimed these public lands as their ancestral home, and that they were entitled to the grazing and other use thereof, that plaintiffs and other Navajo Indians of their small band continued to peaceably occupy and use these lands down to the year 1946, [fol. 30] at which time Dale H. Kinnaman was placed in charge of this grazing district as defendant's agent and employee.

18. That since about the time the defendant's said employee, Dale Herbert Kinnaman, was employed in his capacity as Range Manager of the grazing district herein concerned in 1946, the plaintiff and other Navajo Indians have been harassed and molested by him and by other government agents under his supervision in their livestock grazing use of the area with which this action is concerned, and in

their habitation and peaceable possession and enjoyment of their livestock, homes, camps and limited fields upon these public lands in an effort to force plaintiffs to abandon this area entirely; that on February 3, 1950, the defendant, upon information furnished by the same agents and employees as are heretofore named in these Findings, filed an action in this Court, Civil No. 1803, wherein the United States of America was plaintiff and several of the plaintiffs involved herein, together with other Navajo Indians, were named as defendants; that said action sought the issuance by this Court of a permanent restraining order and injunction to restrain the said Indians from further using the range area with which we are concerned in the action now before the Court; that while the above said Civil Case No. 1803 was pending for decision before this Court the defendant's agents and employees committed the depredations and acts of which plaintiffs herein have complained, and the said Civil Case No. 1803 was only dismissed by this Court on June 27, 1953, for the reason "it appearing to the Court upon representations by representatives of Bureau of Land Management that the defendants have returned to the Reservation and that there are no more trespassers, the questions involved in this case therefore being moot, it is ordered and adjudged that the above entitled cause be, and the same is hereby dismissed."

19. That continuing the plan devised by defendant to so continually harass and attempt to frighten plaintiffs and other Navajo Indians of their small band in this said range area that they would be compelled to yield possession of this area, Dale H. Kennaman told plaintiff Hosteen Sakez-
[fol. 31] zie, on at least two occasions since the year 1946, at meetings which had been called to consider the use by said Indians of this range, that if he (Sakezzie) did not leave the area with his family and livestock that the said Kinnaman would seize and destroy Sakezzie's livestock and would place Sakezzie in jail; that during or very shortly before the depredations were committed by defendant's agents and employees involved in this action, destroying plaintiffs' horses and burros during the period between about July 1, 1952, and the date of the filing of the complaint herein on March 20, 1953, the defendant's agent and employee Dee P. Black participated with Leland Redd and other white live-

stock operators in seizing four of the wives of plaintiffs and of other men of the said band who were out in the range herding their flocks, and in chaining them together with handcuffs, while the said Dee P. Black and the other white men rounded up and loaded into trucks about 400 ewes and lambs belonging to said Indians; that said women were bruised by being chained in this manner until their wrists were badly bruised and bleeding; that one of said women carried a baby in her arms when she was seized and chained to the other three persons; that said sheep were hauled to a corral near Blanding, Utah, a distance of about 45 miles, where the Indian owner was required to pay to said white men $480.00 in order to again get possession of said sheep; that these sheep then had to be driven about 45 miles to get back to their range area; that about 30 head of said animals were killed by said agent Dee P. Black and the other said white men in loading and handling said sheep; that on another occasion and at about the same time as the incident above related, during which said women were chained together out in the range, the defendant's agent and employee Dee P. Black contacted a Navajo woman, Jim Joe's Daughter, a widow with several small children and threatened that unless she immediately took her small flock of sheep and departed from this area that he would take her children from her, would destroy her livestock, and haul her to jail; that said woman owns unenclosed range lands in this said range area upon which she was then herding her sheep which was known to the said Dee P. Black; that Jim Joe's Daughter was so alarmed and intimidated that she immedi-
[fol. 32] ately took her children and livestock and surrendered to defendant her own lands for the use of the white livestock operators whom defendant had permitted to graze the area; that said woman has not returned to this area.

20. That defendant's agents and employees had been urged by the white livestock operators Leland Redd and Alma Redd and perhaps others, to rid the range of the Indians and their livestock so that the area could be exclusively grazed and used by the white permittees to whom defendant had issued grazing permits for the use of this area; that the said agents and employees continued in their harassment of plaintiffs and the members of their families

and finally decided to destroy the horses of plaintiffs, which said agents and employees knew were absolutely essential to the continued existence of plaintiffs and their families in this area.

21. Defendants said agents and employees decided to proceed to kill and destroy said horses under the authority they had concluded was available to them by reason of the provisions of the State of Utah statute, heretofore set forth, Title 47, Chapter 2, Utah Code Annotated, 1953. Defendant's agent and employee, Dale H. Kinnaman, contacted one of the Commissioners of the San Juan County Commission on the street in Monticello, Utah, and told him of his plan and was told by the said commissioner that he saw no objection to the plan. Dale H. Kinnaman then prepared a notice which he delivered to the San Juan Record, a newspaper printed in Dove Creek, Colorado, of general circulation in said County, for publication, and said notice was published in this newspaper once each week between July 10, 1952, and August 7, 1952. The notice published in said newspaper provided as follows:

"Notice of Elimination of Abandoned Horses

Notice is hereby given that in accordance with the provisions of law the Board of County Commissioners, San Juan County, Utah, will proceed to eliminate abandoned horses from the open range in said County, and that beginning on the 10th day of August, 1952, a drive will be held and all abandoned horses running upon open range will, under the [fol. 33] direction and supervision of the County Commissioners, be eliminated.

All owners of horses running upon the open range are hereby given notice to file with the Board of County Commissioners within thirty (30) days from the date given below, a description of such horses and the brands and marks thereon.

Dated this 10th day of July, 1952.

By order of the Board of County Commissioners of San Juan County, Utah.

(Signed) Pearl Butt, County Clerk.

First pub. July 10, 1952. Last pub. Aug. 8, 1952."

Sometime after the publication of said notice had been completed defendant's agent, Dale H. Kinnaman, contacted another of the members of the three-man board of San Juan County Commissioners and advised him of his plan to destroy the plaintiffs' horses and asked that something be made a matter of record on the minutes of the said county Commissioners to protect defendant in its proposed action, and to authorize the publication of the said notice which had already been published. Accordingly, there was inserted in the minutes of the meeting of the Board of County Commissioners of said County on September 2, 1952, the following:

"Resolution.

"On this ~~9th day of July, 1952,~~ the Board of County Commissioners of San Juan County, Utah, resolve and direct as follows:

"That efforts will be initiated within the next thirty (30) days to remove abandoned horses, as defined in 64-2-3 of the laws of this State, from open ranges within this County. And with the understanding that the Advisory Board of Monticello Grazing District, Utah 6, shall pay all costs incident to the removal of said horses, the said Advisory Board is hereby exclusively engaged to remove said horses under the direction of this Commission. The County Clerk is hereby directed to immediately cause to be published the [fol. 34] necessary notice in the San Juan Record newspaper, according to the provisions of law.

"All captured or killed horses shall become the property of the said Advisory Board with the understanding that it may make such disposition of the horses or carcasses as it sees fit with the reservation that all live captured horses shall be shipped outside the boundaries of the Monticello Grazing District.

San Juan County Commissioners, (Signed) J. W. Crowley, Leon W. Adams, John D. Rogers.

"This resolution to stand until rescinded."

The Board of County Commissioners of said County had nothing further to do with this plan to eliminate plaintiffs'

horses, neither in authorizing the same nor in carrying out the plan. Dale H. Kinnaman and Dee P. Black, during the month of July, 1952, had printed in the English language and then posted in the City of Monticello and at various places surrounding and within the area herein concerned not less than five of said notices which were in the same words as the notice printed in the San Juan Record newspaper, above set forth.

22. That the notices published and posted as above set forth provides that the County Commissioners will supervise and direct the elimination of abandoned horses, and the insertion in the minutes of the meeting of said Board on September 2, 1952, sets forth that the Advisory Board of Monticello Grazing District No. 6 is engaged to carry out the elimination of abandoned horses, to pay all costs relating thereto, and that the horses and their carcasses would be the property of the Advisory Board. The said Advisory Board knew nothing about this activity until October 9, 1952, after a number of the horses had already been killed by defendant's agents and employees. On said date defendant's agent and employes advised the Advisory Board of what he had accomplished in killing the Indians' horses and of his plans to continue to completely destroy all of their horses, and the said Advisory Board then adopted a resolution approving and ratifying defendant's actions [fol. 35] and plans. The Advisory Board had nothing to do with authorizing or carrying out the plan to destroy the horses involved herein except for the passing of the resolution mentioned above. There had been no discussion at any time between the Board of County Commissioners and the Advisory Board relating to this program.

23. Defendant's said agents and employees planned to shoot and leave on the range any horses which they were unable to capture and ship by truck to a glue factory or horse meat processing plant known as Kuhni Packing Plant at Provo, Utah, some 350 miles northwest of the area or range herein concerned. To accomplish this the defendant purchased about 800 rounds of 30—30 calibre rifle ammunition and armed its agents with rifles to fire said ammunition. The plan was to leave no live horses whatever in the ownership or possession of plaintiffs or others of their band of

Indians. Government trucks hauled some of the horses to said packing plant and defendant's agents hired large privately owned trucks to haul such horses as were not hauled in government owned vehicles.

It is the nature of a horse born and raised on a section of range land to leave that range under no conditions, and if taken therefrom such horses will, if kept alive, and not in a well-fenced enclosure, return for many miles to their home range, all of which was well known by defendant's said agents and employees, and it was for this reason that defendant's said agents determined upon and carried out the plan to kill all of plaintiffs' horses.

24. It was the plan of defendant's said agents to kill only the horses belonging to plaintiffs and others of their small independent band of Indians, and not to destroy or to gather the horses of others. Defendant's said agents well knew to whom these horses belonged, and knew where to find and capture or kill them on the range; that said agents and employees had no intention of giving plaintiffs an opportunity to regain possession of their horses, and made no effort to find the owners thereof, nor to return them to plaintiffs, but shot and killed many of them on the range, and hauled the remainder as rapidly as possible to the said packing plant, so as to not permit plaintiffs an opportunity [fol. 36] of reclaiming them, where they were sold for a total of about $1,700.00, at the dead and useless horse price of two and one-half cents per pound. No part of said money or any money was ever paid or offered to plaintiffs or to any of them, but was received and retained by defendant, or by its said agents and employees.

25. In killing and destroying plaintiffs' horses the said agents and employees of defendant drove into the range area in which plaintiffs lived with trucks, which hauled their own saddle horses and rifles. Upon locating a band of the plaintiffs' horses said agents and employees would unload their own saddle horses and ride them to round up and drive the horses of plaintiffs to a government owned or controlled corral near Blanding, Utah, a distance of up to 45 miles, or to herd these horses against a suitable loading spot from which they were loaded directly into the trucks and were then hauled out of the area. Such horses

as could not be driven or loaded were shot and killed by defendant's said employees and their carcasses left in the range. The horses were brutally handled in loading and hauling them. On one instance a horse's leg was found protruding through the side of the truck body, and defendant's agent, Dee P. Black sawed off that part of the horse's leg which was protruding. Many of the horses were killed by being jammed into the trucks and in being hauled over the rough roads without regard to the lives of the animals. Bull whips were used by defendant's said employees in forcing them to enter the trucks.

26. About 5 head of horses belonging to white men were in this range area and were unavoidably gathered with some of the plaintiffs' horses. The horses belonging to these white citizens were hauled directly to the corrals or pastures of the owners and a fee of $2.50 per head to cover expenses was charged by defendant's agent. In the one instance where one of plaintiffs, Little Wagon, found his horses in the possession of defendant's agent Dee P. Black and was able to discuss the possibility of reclaiming them, he was advised that the charge to him would be $60.00 per head. In no other instance did the agents or employees of defendant offer to plaintiffs or any of them the return of their horses at any price, and the said agent and em- [fol. 37] ployee of defendant knew or had good reason to believe that Little Wagon was financially unable to pay this sum, and did not intend to return these horses to him under any conditions, and refused to allow Little Wagon to take back his horses or any of them.

27. That in the capturing and killing of the horses belonging to the plaintiff, Hosteen Sakezzie, defendant's agents Dee P. Black and Robert S. Krumm, took a position on a bluff overlooking said plaintiff's hogan, where they waited and watched said horses being turned out from the corral at dusk onto the range to forage; that said agents waited until said horses had travelled about one mile around a ridge point, and started to climb to the higher bench lands, and then, in the darkness, rounded them up and drove them 35 miles, during the night, to the corral where they were loaded about sunrise the next morning into a truck and shipped to the Kuhni Packing Company process-

ing plant near Provo, Utah; that as the last of the Sakazzie horses were being loaded into the truck by defendant's agent and employees, Dee P. Black, with the aid of Leland Redd and other white men, four members of Sakezzie's family, three men and one woman, having tracked the said animals and the defendant's said agents for the 35 miles from the point near their hogan to the corral into which the horses had been taken near Blanding, Utah, arrived at the said corral and in a peaceable manner advised Mr. Black that the horses belonged to Sakezzie and that they desired to take the horses back to their home; that immediately upon the arrival at the corral by said Indians, Leland Redd drove away in a car and, within a few minutes, reappeared with several men armed with rifles, the loading mechanisms of which were worked before the said Indians, to convey to them the understanding that defendant's agents were prepared to shoot the said Indians if they made endeavor to retake possession of these horses; that the defendant's agents and employees refused to give Sakezzie or the members of his family any opportunity to repossess their horses; that the acts of securing the said armed men and the threatening use of the guns they carried was done under the direction and authority of the defendant's agent, Dee P. Black, who was in charge of the loading of [fol. 38] these horses into the truck for direct shipment to the packing plant for slaughtering; that said use of guns and armed men was designed to place plaintiffs in an extreme state of fear and anxiety; that the said four Indians were very alarmed and freightened by said acts and peaceably left the corral after the arrival of the armed men and the said exhibition by them of their guns and returned without any of the Sakezzie horses to their hogan near Montezuma Creek. That said agents knew beyond any possible doubt to whom said horses belonged; that said agents knew at all times that the horses involved in this action belonged to plaintiffs or to some of them.

28. That defendant's agents and employees not only knew, at all times herein concerned, to whom the horses belonged which they planned to and did kill, but the defendant's agent, Dee P. Black, has spent the greater part of his life in a community, Blanding, Utah, adjoining the area

here in question and has, for 30 years or more, had frequent and continuous contact with plaintiffs, and has learned and knew of the location of their hogans and camps, how they managed their livestock, where the Indians and their livestock could be found each season of the year; he knew of the customs and beliefs of plaintiffs, the great importance and value to them of their horses and burros, and the said agent and employee was assigned by defendant to carry out the killing of plaintiffs' horses because he had this intimate knowledge of the range and of plaintiffs and their horses, and because he was of a sadistic nature which enabled him to carry out the plan as herein set forth.

29. Plaintiffs produce no cultivated hay or other forage crops, and their range is a wide and undeveloped area not fenced or otherwise enclosed, so that only animals able to live year long upon the scant forage of their land can survive. Any horses which the plaintiffs might buy from other areas in an attempt to replace their horses will try to escape from this range and return to that from which they might be purchased; that to keep any newly purchased animals would require that they be fed hay, which would have to be purchased and hauled into this area, to keep them alive until colts could be born in this range and kept until they had [fol. 39] matured to 4 years of age, at which time they would be old enough to break and use, and the destruction of their horses has made it practically impossible to replace them under the conditions and in the area in which plaintiffs live. Plaintiffs are a sensitive people living isolated and alone in this remote desert area. Their contact with white people is very infrequent. They buy what goods they require and sell what animals, rugs and other items they have to sell at their own trading post which is operated by a member of their tribe who speaks their own language. The contacts of plaintiffs with white men generally have been at least unpleasant if not generally offensive, and they have come to avoid contact with white people, to be fearful of them, and the plaintiffs and their people are particularly frightened and disturbed by any hostile acts committed against them by government agents and employees. Plaintiffs are not trained nor able to turn to methods of making a living in

competition with white men and only know how to provide themselves with a living in the way they and their ancestors have lived by caring for their livestock and gathering the nuts and securing the wild game which nature provided; plaintiffs neither own nor are able to drive automobiles. Plaintiffs know no other land than this range area, and are not of a nature that they can take up another life in some other area, if any there were to which they could go. Life to plaintiffs without horses to love, cherish, raise, break, train and use is a worthless, useless existence without value or purpose. The white men who are permitted by defendant to graze these lands graze them only during the winter months, having permits to graze nearby National Forest lands in high mountain ranges during the summer seasons, but plaintiffs have no such lands to which to go in the summer and must remain in the area herein concerned during the hot summers as well as the cold winters. Plaintiffs' horses were unique animals, bred for decades out of original Indian stock, a toughened and durable beast, selected and painstakingly broken and trained to meet the particular needs of their masters under any and all conditions in this range in which they had been born and which they knew so well, the trails, the springs, the forage areas, the places of refuge from the blizzards of winter. The horses of [fol. 40] plaintiffs are not replaceable by any other living horse, and can only be replaced, if at all, in any practical time or manner, by keeping horses in the area until colts can be raised up to start the beginning of a band of horses raised in this area which can again be bred, selected, and trained to survive and meet the needs of plaintiffs. This would require about 5 years to get the beginnings of such a band large enough to use. All of this was well known to defendant's said agents and employees, who knew and intended that by killing plaintiffs' horses they would deliver such a horrible shock and loss to plaintiffs that they would cease to be able to survive in this area.

30. The horses of plaintiffs were plainly branded, and some of the brands thereon were duly recorded in accordance with State law; the said agents and employees of defendant knew these brands to be the brands used by plaintiffs as well as they knew that the horses belonged to plaintiffs.

31. That the said agents and employees killed during the period concerned herein, and within one year from the filing of the complaint herein, 115 head of horses and 38 burros, which were either shot and killed upon or captured within the range area herein concerned, which belonged to plaintiffs; that by such acts the plaintiffs have been reduced to a condition of extreme want and privation, they have been so frightened, shocked and alarmed thereby that they became apprehensive of their lives and personal safety; that as a direct and natural result thereof the women and children of plaintiffs' families were afraid to sleep in the hogans at night, but have gone into the adjacent rocks and crags to sleep; the women and children have become afraid to go about their work to gather or herd their livestock, or to secure wood and water required at their hogans and camps, and plaintiffs and their families, the women and children have been subjected to a hopeless and fearful existence.

Damages

1. That plaintiffs have never engaged in selling their horses to white men, but only in trading them among themselves; that plaintiffs engage in a barter system among [fol. 41] their people whereby they trade animals of different classes one to another; that at the time of the taking by defendant of plaintiffs' said horses and burros, 5 cows which had a market value of $200.00 per head, or from 30 to 35 head of sheep, which had a market value of $30.00 per head, were freely traded for one horse or one burro; that the reasonable market value of a white man's horse of average quality was $300.00 per head at the said time and place; that there is no reasonable market value among white men for an Indian raised and trained horse; that it will require the plaintiffs not less than 5 years to raise colts from horses they might buy from white men and to replace with somewhat similar animals those they lost by the acts of defendant, and at a replacement cost to them of $1,000.00 per head; that the rental value of horses within the State of Utah at the time involved herein is $5.00 per day and the plaintiffs have been denied the use of their horses for a period prior to the filing of their Complaint herein. That the average market price of hay delivered

to this area is $40.00 per ton, which was the market value of hay delivered in this area at the time said animals were taken.

2. Plaintiffs have suffered very extensive consequential damages as the direct, natural and proximate result of the killing by defendant of their horses. The loss of their horses has left plaintiffs practically helpless in their way of life. Whereas they had been able to ride their horses in performing their tasks they are now forced to walk, to travel and perform their work on foot. Their horses had been used to make the long trips to springs to carry water to their hogans and camps, and to carry or drag or haul wood which they must have to prepare their food and to warm themselves in cold weather seasons, to pack their supplies, to till their small plots of native corn, to pack the pine nuts and the game which they could reach and harvest with the use of their horses. The horses were ridden to carry all members of the plaintiffs' families the long distances to and from their trading post, to their ceremonies, and council meetings, to visit one another in their camps. The horse was needed daily by plaintiffs in herding their cattle and sheep, and without the horse they cannot man- [fol. 42]. age their other livestock. Without the use of horses plaintiffs have been unable to care for their other livestock and will gradually be unable to operate any substantial number of cattle, sheep or goats.

Some of the tasks the plaintiffs had been able to perform with the use of their horses they are unable to do without them, such as making the long treks to the pine nut bearing areas, or to the range where deer and other game can be found. They are unable to till their plots of earth for the production of corn. The food they received from these endeavors is no longer available to them. They cannot make the long trips to secure the heavy and better wood they could reach with the use of their horses and must now gather small sticks and brush closer to camps which they are able to carry in their arms.

3. Plaintiffs have also suffered considerable damage through the mental pain and suffering which they have undergone as the result of the killing of their horses. These people have been deeply grieved by the unnatural manner in which their animals lost their lives. The possessions of

these primitive people are very few, and among the few they have—none is so endeared and useful to them as the horses they owned and used. An unusual fear of death in their land has to come to them since they are without their horse to accompany their spirits into the after-life existence in which they believe. With a very great part of their meager means of providing themselves with food now denied them, such as pine nuts, the game, the corn, they are left with only their cattle, sheep and goats, and their task of caring for these animals is beyond their strength on foot. The plaintiffs are fearful that they will not be able to provide themselves with food upon which to keep their families alive. They fear a severe winter during which they could not find wood to keep their families warm, and without the means of carrying their people to places of safety during any emergency condition. The plaintiffs have been shamed and disgraced by the acts of their guardian in killing, in this wanton and malicious way, all of their horses with the plain design and intent to break [fol. 43] the pride and ability of this people to make their own living upon lands they believed their own, and upon which they had, with their ancestors, always lived. Life in the camps and on the range is meaningless and without significance for plaintiffs without horses. Their most important means of training their children, and of exercising their spiritual life is taken from them. Plaintiffs have been very grievously pained and distressed; they have been subjected to unreasonable mental torment, fear and anguish through the killing of their horses. All of these damages—the loss of their animals, the consequential damage, and the mental pain and anguish, suffered by plaintiffs, are the direct, natural and proximate result of the intentional, wanton, malicious acts of defendant in killing the horses which plaintiff owned.

From the foregoing Findings of Fact, the Court concludes:

Conclusions of Law

1. That the State of Utah statute enacted in 1927, before the enactment of the Taylor Grazing Act, was a statute without force or effect to control the use or management of livestock upon public domain at the time the acts com-

plained of by plaintiffs were committed. While the said statute, Title 47, Chapter 2, Utah Code Annotated, 1953, might have been used as a valid exercise of the police power of a State to control the activities upon public lands during that period of time prior to the enactment of legislation by the Congress of the United States to control, under the laws of the United States, the use and management of these lands, said statute was no longer of force or effect upon the enactment of the Taylor Grazing Act. The Taylor Grazing Act was enacted for the specific purpose of bringing under the exclusive grazing control and management by the United States of the public domain, over which it had theretofore exercised no control. But upon the enactment of this legislation, the United States took over this obligation, and the States in which the public domain is located were then without authority to further proceed under State laws. The State of Utah statutes could not now, after the Taylor Grazing Act is enacted, make any determinations as to what citizens might use [fol. 44] these lands, it could not determine the class and number of livestock to graze said lands, fix seasons of use, nor impose any penalties under State statute for use made thereof. The United States had decided to undertake the complete control of its own lands, and State statutes having to do with this problem became ineffective upon enactment and implementation of the Taylor Grazing Act. It would be of no assistance to defendant how meticulously the provisions of the said statute of the State of Utah had been followed for the reason that the statute had ceased to be of force and effect as it related to the right of the subdivisions of the State to control the running of abandoned horses or any other livestock upon public domain.

2. But even were it to be concluded that the above-mentioned statute of the State of Utah was valid and in full force and effect at the time the acts of defendant were committed, it is concluded that the provisions of that statute were not followed. No resolution was ever passed by the Board of County Commissioners of San Juan County to authorize or to direct the elimination of these horses belonging to plaintiffs. The matter was not considered at any meeting of said Board except at its meet-

ing of September 2, 1953, after the notices had been published in the newspaper by defendant's agent and employee, Dale H. Kinnaman, and then nothing more was done than to insert in the minutes of said meeting a statement, not amounting to a resolution, as set forth in the Findings of Fact herein, that the Advisory Board might undertake at its own cost and expense the elimination of abandoned horses. The publication and the posting of the notices was without force or effect because the same was not supported by a resolution of the Board of County Commissioners authorizing this to be done. Nor was there any resolution by the Board of County Commissioners to authorize the Advisory Board to undertake the elimination of abandoned horses. The Advisory Board knew nothing of the program until October 9, 1952, by which date a considerable number of the horses of plaintiffs had already been killed by defendant's agents and employees. The Advisory Board had neither made any offer to the Board of County Commissioners that it be authorized to under-[fol. 45] take this program, nor did it accept from the County Commissioners any authority to so act.

The fact that defendant's agent privately talked to two members of the Board of County Commissioners about the program he desired to follow to kill the plaintiffs' horses, and received their private consent thereto, was not to be construed as any official act of the said Board. The functions of this Board and its authority to do business may not be delegated, and the fact that the individual commissioners might have told the said agent and employee that it was agreeable with them to go ahead with his plans did not amount to the official granting of authority to so proceed. This defect was not cured by inserting in the minutes of the meeting of September 2, 1952, the statement there inserted. This was no more than a belated and ineffective attempt to endeavor to shield defendant from the consequences of its own unlawful acts.

The provisions of this State statute could not apply here for the further reason that the horses involved were not "abandoned" as contemplated by the statute. They were everything but abandoned. They were used daily in the performance of the work of their owners, the plain-

tiffs, and this was well known by defendant's said agents and employees. The horses were not unbranded, but they were branded and with brands recorded and decipherable.

The provisions of this statute were further disregarded by defendant's said agents and employees who made no attempt to return the horses which were captured to their owners, who were well known to said agents and employees. Their intentions were to get the horses killed or out of the County as rapidly as possible to avoid the possibility that plaintiffs should find them and take possession of them, much less to make any endeavor whatsoever to return these animals to their owners.

3. The defendant failed to comply with its own statute and regulations governing any trespass use by livestock of lands under its control. If the livestock of plaintiffs were not lawfully using these lands, they were trespassing upon them. The Taylor Grazing Act makes provisions for [fol. 46] imposition of penalty for violation of its provisions, and provides a maximum penalty of $500.00 for such violation. The Federal Range Code provides a procedure to be followed in cases of trespass. None of the requirements thereof were met by defendant, nor was any attempt made by defendant's agents and employees to follow any of the requirements of the Taylor Grazing Act or of the Federal Range Code. Under no circumstances could the defendant have committed the acts of which plaintiffs complain, and which were committed by defendant, and escape liability under the laws of the United States. The defendant intended and endeavored to commit these acts and to escape all liability by reason of the provisions of the heretofore cited State of Utah statute, which for the reasons above set forth offered no protection.

Had the defendant's agents endeavored to follow their own regulations governing the grazing without license of livestock upon public lands it would have served plaintiffs with a notice of trespass, and followed this up with endeavor to make an amicable settlement of the government's claim, failing in which they would have referred the matter to the United States Attorney for appropriate action. None of these things were done or attempted by defendant's said agents and employees; had the matter been re

ferred to the United States Attorney the plaintiffs would have had opportunity to prove their right to the use and occupancy of these lands in any trespass action he might have instituted against them. This opportunity the defendant did not intend to allow plaintiffs to be able to use. Said agents and employees, under the encouragement of Leland and Alma Redd, white livestock permittees in this area, had determined to take matters into their own hands by immediately killing all of the Indians' horses, and thus destroy the ability, if not the will of plaintiffs, to further inhabit this range. Defendant's agents had satisfied themselves that plaintiffs would, in all probability be financially and otherwise unable to institute any action to seek damages, but that if they did so and were able to recover anything the measure of damage would be the glue factory price which defendant would receive for the horses, which funds they would be in position to pay, but the plaintiffs would [fol. 47] nevertheless be never again able to replace these animals and would disappear from the range, leaving this several hundred thousand acre area available for the exclusive use of defendant's white livestock permittees, at no cost to anyone except the plaintiffs.

4. The acts of defendant's agents in killing these horses belonging to plaintiffs has, of course, eliminated their value to plaintiffs. These animals were unique among horses by reason of having been bred, selected, trained and toughened to live in and withstand the particular requirements and rigors of the life of Indian people. They are not substantially replaceable. Years, not less than 5 will be required for plaintiffs to be able to raise in this range area horses which will stay and be able to survive in this area, and these animals will not closely approach the quality of the horses which have been destroyed. The cost of buying and keeping animals fed hay, which would have to be bought and hauled into this area, in stables, corrals or other enclosures imposes very serious problems by reason of the prohibitive cost and the work and labor of taking care of these animals until colts could be born in and raised upon these lands. There is a question whether plaintiffs can themselves survive for this length of time in this area without the use of their horses.

5. The killing of plaintiffs' horses has made their already

severe condition of life almost, if not entirely, unbearable for them. They now must carry their water to their camps on their backs, they are unable to carry the wood for the many miles their horses had been able to travel to secure for them wood of a good size and quality for burning and they must now gather sticks and brush for fuel, they are no longer able to gather their accustomed pine nuts in areas too remote for travel on foot, their ability to hunt game has been destroyed, they have no means of taking sick or injured members of their families to the care of doctors, nor are they able to bring doctors to their camps, they are unable to attend their religious and other ceremonies, unable to travel to schools, they are unable to herd and care for their cattle, sheep and goats, they are unable to visit together among their people, and must carry their supplies on their backs from their trading post to their [fol. 48] hogans and camps, their means and method of travel has been destroyed, and they are now denied their most precious possession which has always been necessary in their way of life, denied the right to have their children own and train and grow to understand and love a horse or burro.

6. The acts of defendant's agents and employees, in killing plaintiffs' horses, has frightened, intimidated and cowed them. Plaintiffs have been made fearful for the lives of their families to such an extent that the women and children were required to sleep in the rocks and brush a safe distance from the hogans lest defendant's agents visit them at night to do personal harm to the persons. The carrying and display of guns and the use thereof by defendant's said agents and employees in wantonly and sadistically killing plaintiffs' horses deeply shocked their minds. They are particularly saddened by the unnatural way in which their horses have died. The means of satisfying their spiritual and religious needs have been taken from plaintiffs and their families by the killing of all of their horses. The entire families of plaintiffs have been placed in a condition of remorse, and they are tormented by their condition. The precious fabric which held together the plaintiffs' way of life has been rented away. These horses were more than property to plaintiffs, they had been their constant close friends, companions, and helpmates,

their means of progression in earthly life. Plaintiffs have suffered great mental pain and anguish as the natural result of the killing by defendant's said agents and employees of their horses.

7. The Court finds that the defendant's agents have continued to harass plaintiffs and their livestock within the area here concerned since the employment by defendant within this area of Dale Herbert Kannaman and Dee P. Black and that, unless restrained and enjoined by this Court, the defendant will continue this harassment and injury to the plaintiffs and their families; that the testimony in this case shows that plaintiffs have been in possession of these lands and have lived upon them for a time preceding the coming of the white man to the west; that there is much evidence in this case to support the position that plaintiffs are entitled to the permanent and [fol. 49] exclusive use of the public lands involved herein, but the determination of this question requires further evidence, and the difficulties out of which this case has grown can only be permanently settled upon a full determination of this question.

8. The damages which plaintiffs have suffered in the way of consequential damages, mental pain and suffering and the loss of the value of their horses and burros, is the direct, proximate and natural result of the willful, wanton, malicious and unlawful acts of defendant's agents and employees in killing plaintiffs' horses and burros. These acts as alleged and provided by plaintiffs constitute a tort under the provisions of the Federal Tort Claims Act and plaintiffs are entitled to judgment against the defendant and in favor of plaintiffs for money damages in the sum of $100,000.00, and for their costs incurred in this action.

Plaintiffs are entitled to a further judgment against defendant restraining and enjoining defendant, its agents, employees and all persons acting in cooperation or conjunction with defendant or its said agents and employees from the further killing, or molesting of plaintiffs' livestock, and from the further harassing or molesting of plaintiffs or their families, in their quiet use and enjoyment of the public lands involved in this action, and from the further disposal of any of the lands involved in this action, or of any interest therein, pending the settlement and de-

termination of the rights of plaintiffs in and to said lands, which injunction and restraining order shall be in effect until the further order of the Court. Let judgment be entered accordingly.

Dated this 22nd day of January, 1954.

Willis W. Ritter, Judge.

Filed Jan. 30, 1954.

In United States District Court

Judgment and Restraining Order—January 18, 1954

This matter coming on regularly for hearing before the Court on November 17, 18, 19, 20 and 21, 1953, plaintiffs appearing in person and by Milton A. Oman, and defendant [fol. 50] being represented by A. Pratt Kesler, United States Attorney for the District of Utah, and Llewellyn O. Thomas, Assistant United States Attorney for said District, and the Court having heard evidence in support of plaintiffs' Complaint and of defendant's Amended Answer, and the arguments of counsel, and the matter being submitted and the Court having made and entered its Findings of Fact and Conclusions of Law, it is hereby:

Ordered, Adjudged and Decreed that the Court retains jurisdiction of this cause for the purpose of endeavoring to settle and determine upon further hearing and evidence the issue in this case as to whether the plaintiffs are entitled to the permanent use and occupancy of or title to the public lands here in queston, and that defendent, its officers, agents and employees, individually and collectively and all others acting in behalf of or in any manner in cooperation or in conjunction with, or in assistance or aid of, or to defendant, its officers, agents, and employees, be, and they are hereby restrained and enjoined from the further harassment or molesting of plaintiffs, their families and the members thereof, in their quiet and peacable possession, and use of the said public lands; from the killing, molesting, driving, moving or interfering with the livestock owned or operated by plaintiffs upon these public lands, and from taking further action under any of the applicable laws and

regulations to dispose of any of said lands or any interests therein, which are located within an area described as:

Beginning on the Utah-Colorado State line at a point where said line intersects or joins the north boundary of the Aneth Extension of the Navajo Indian Reservation, thence north along said line to the Township line, between Township 36 South and Township 37 South, Salt Lake Meridian, thence west to the range line between Range 17 East and Range 18 East, Salt Lake Meridian, thence South to the north boundary of the Navajo Indian Reservation, thence North-easterly along the North boundary of said Reservation, to the point of beginning.

It Is Further Ordered, Adjudged and Decreed that the injunction and restraining order hereby issued shall remain in [fol. 51] full force and effect until such time as the Court otherwise orders.

It Is Further Ordered, Adjudged And Decreed that an additional and separate judgment will be entered in this matter as to the damages awarded to plaintiffs as determined by the Court.

By the Court. Willis W. Ritter, Judge.

Copy of the foregoing Judgment and Restraining Order received this 15th day of January, 1954.

A. Pratt Kesler, United States Attorney for the District of Utah, Atty. for Defendant. By: Llewellyn O. Thomas.

Clerk's Note: Notation of entry of Judgment made in Civil Docket on January 18, 1954, in accordance with Rule 79 of the Rules of Civil Procedure.

Filed Jan. 18, 1954.

In United States District Court

Judgment—January 30, 1954

This matter coming on regularly for hearing before the Court on November 17, 18, 19, 20 and 21, 1953, plaintiffs appearing in person and by Milton A. Onan, and defend-

ant being represented by A. Pratt Kesler, United States Attorney for the District of Utah, and Llewellyn O. Thomas, Assistant United States Attorney for said District, and the Court having heard evidence in support of plaintiffs' complaint and of defendant's Amended Answer, and the arguments of counsel, and the matter being submitted and the Court having made and entered its Findings of Fact and Conclusions of Law, it is hereby:

Ordered, Adjudged And Decreed that plaintiffs be and they are hereby granted judgment against the defendant [fol. 52] and in favor of the plaintiffs in the sum of $100,000.00, and that plaintiffs have their costs incurred in this action; and

It Is Further Ordered, Adjudged And Decreed that Milton A. Oman, attorney for plaintiffs, is awarded as attorney's fee for his services in this action, 20% of the judgment herein, which amount is to be paid from, but not in addition to, the sum herein awarded to plaintiffs.

By the Court.

Willis W. Ritter, Judge.

Dated: January 30, 1954.

Clerk's Note: Notation of entry of judgment made in Civil Docket on January 30, 1954, in accordance with Rule 79 of the Rules of Civil Procedure.

In United States District Court

Notice of Appeal—Filed March 18, 1954

Notice Is Hereby Given that the defendant in the above entitled action, The United States of America, hereby appeals to the Circuit Court of Appeals for the Tenth Circuit, from that Judgment and Restraining Order made and entered herein on the 18th day of January, 1954, and from the whole thereof.

A. Pratt Kesler, United States Attorney. Llewellyn O. Thomas, Ass't. United States Attorney; Attorneys for Appellant.

Filed March 18, 1954.

IN UNITED STATES DISTRICT COURT

NOTICE OF APPEAL—Filed March 18, 1954

Notice Is Hereby Given that the defendant in the above entitled action, The United States of America, hereby appeals to the Circuit Court of Appeals for the Tenth Circuit, from that Judgment made and entered herein on the 30th [fol. 53] day of January, 1954, and from the whole thereof.

A. Pratt Kesler, United States Attorney. Llewellyn O. Thomas, Ass't. United States Attorney. Attorneys for Appellant.

Filed March 18, 1954.

IN UNITED STATES DISTRICT COURT

PETITION TO PERPETUATE TESTIMONY—Filed April 30, 1954

Petitioners are Navajo Indians, wards of the United States of America, and plaintiffs in the above-entitled action. In connection with the issues involved in the above designated action, the following has occurred:

1. On March 23, 1953, Complaint was filed and trial thereon was held between November 17 and November 21, 1953, and on January 18, and January 30, 1954, judgments restraining defendants from further interference with plaintiffs upon the lands involved, and a separate money judgment in favor of plaintiffs and against defendant were respectively filed. On March 18, 1954, defendant filed its Notice of Intention to Appeal each of the above-mentioned judgments and every part thereof.

2. That in order to dispose of the issues relating to the restraining order issued herein, it will be necessary that further testimony and evidence be taken relating to the use and occupancy by plaintiffs of the lands involved, and as to other rights of plaintiffs to receive from defendant patents to such of the lands within the area involved as remain in the ownership of defendant.

3. The testimony to be perpetuated will show that the plaintiffs and other Navajo members of their small band are entitled to the ownership of the lands involved and

that they are entitled to the exclusive and perpetual use and occupancy of these lands.

4. The reason for perpetuating this testimony is that many of the witnesses are aged and infirm people in possession of material facts and information valuable to [fol. 54] plaintiffs and other Navajo Indians in the action now pending before this Court and such information as is now available must, in order to prevent a delay or failure of justice, be preserved not only for a proper disposal of the action now before the Court, but for use in future actions which plaintiffs intend to bring or which other Navajo Indians will likely pursue to dispose of the problems existing between the Navajo Indians and defendant relating to the lands herein; to the right to receive title thereto and to the future use and occupancy of these lands.

The names and addresses of the persons to be examined are as follows: Luny Morris, Holones, Colorado. Chris Christensen, Monticello, Utah. Lee Kelly, Cortez, Colorado. Sam Ahkeah, Window Rock, Arizona. Caroline (an aged Navajo woman) residing in Montezuma Creek, San Juan County, Utah. Sleepy Widow (a Navajo woman) residing in Montezuma Creek, San Juan County, Utah, together with petitioners herein.

The testimony of the above witnesses will prove:

(a) That the Chiefs or leaders of the plaintiffs and the small band of Navajo Indians to which they belong, nor their ancestors, have, at no time, surrendered to the United States of America.

(b) That the said Chiefs or leaders of petitioners and the said band of Navajo Indians, at no time, entered into treaty with the United States surrendering the possession or right to possession of the lands involved.

(c) That petitioners and other members of said band of Navajo Indians, have at all times, used and occupied, grazed their livestock, and lived upon the lands herein concerned.

(d) That petitioners and the said band of Navajo Indians are entitled to receive the fee title to the lands involved herein which remain in the ownership of the United States of America, and that they are further entitled to the perpetual and exclusive use and occupancy of said lands.

Wherefore, petitioners pray for an order to be issued [fol. 55] that the testimony and documentary evidence, and evidence in any other form be heard and received by the Honorable Court at its earliest convenience for the purpose of perpetuating the testimony as herein set forth.

Dated this 30th day of April, 1954.

Milton A. Oman, Attorney for Petitioners.

Filed with proof of service and notice, April 30, 1954.

In United States District Court

Defendant's Objections to Plaintiff's Petition to Perpetuate Testimony—Filed May 5, 1954

Defendant, United States of America, objects to the granting of the plaintiff's Petition to Perpetuate Testimony, duly filed herein, for the reasons:

1. Lack of jurisdiction of this Court over the subject matter referred to in said Petition; and

2. Matters recited in said Petition, and particularly in paragraphs (a) to (d) inclusive therein are not within the issues of the above-entitled case.

Dated this 5th day of May, 1954.

A. Pratt Kesler, United States Attorney; Llewellyn O. Thomas, Ass't United States Attorney, Attorneys for Appellant.

Filed with proof of service May 5, 1954.

In United States District Court

Minute Entry Granting Motion to Perpetuate Testimony

This matter came on for hearing upon the application of the plaintiffs to perpetuate testimony. The plaintiffs were represented by Mr. Milton A. Oman, and the defendant was represented by Mr. Llewellyn O. Thomas, Assistant U.S. Attorney.

[fol. 56-65] The court, after listening to the arguments of counsel and being fully advised, granted the motion.

IN UNITED STATES DISTRICT COURT

STIPULATION RE LAND INVOLVED—Filed Nov. 17, 1953

It is hereby stipulated by and between the parties hereto through their respective counsel as follows:

1. The land involved herein consists of Federal Range set apart for grazing and is located within the Utah Grazing District No. 6, established by order of the Secretary of the Interior on June 22, 1935, under the provisions of the Taylor Grazing Act, 43 U.S.C.A., Sec. 315 et seq., and that Dale Herbert Kinnaman is the Range Manager in charge of administering the Taylor Grazing Act and the Federal Range Code, 43 Code of Federal Regulation, Part 161, in said grazing district.

2. D. P. Black is likewise an employee of the Bureau of Land Management and is Range Aide under the supervision of Dale Herbert Kinnaman in the said grazing district.

3. That Kelso P. Newman is also an employee of the Bureau of Land Management and is the immediate Supervisor of Dale Herbert Kinnaman and D. P. Black.

4. That H. Byron Mock is an employee of the Bureau of Land Management in administrative charge of all activities [fol. 67] within the State of Utah involving public land administration under the Taylor Grazing Act and is the Supervisor of Kelso P. Newman, Dale Herbert Kinnaman and D. P. Black.

5. That notice of elimination of abandoned horses and affidavit of publication of same in San Juan Record, which affidavit is dated October 2, 1953, may be admitted in evidence provided, however, it be agreed that said newspaper is printed in Dove Creek, Colorado.

6. Certified copy of the resolution of the Board of San Juan County Commissioners dated July 9, 1952, respecting notice of elimination of abandoned horses will be received in evidence.

7. Between September 19, 1952, and February 20, 1953, defendant's agents conducted round-ups in which they gathered a number of horses and burros which were disposed of by said agents.

8. Plaintiffs have not been granted licenses or permits by the Bureau of Land Management to graze either horses, or burros, or any other livestock, on the lands described in

the complaint of plaintiffs for the period of time which is involved herein.

9. Fred W. Keller was during the time herein concerned, a member of the Advisory Board of Utah Grazing District No. 6, said Advisory Board being duly established pursuant to the provisions of 43 U.S.C.A., Section 315-o-1.

10. Defendant's agents and officers named in the complaint were regular and full time employees of the Bureau of Land Management for all times herein concerned.

Dated this 16th day of November, 1953.

A. Pratt Kesler, United States Attorney; Llewellyn O. Thomas, Assistant United States Attorney, Attorneys for Defendant. Milton A. Oman, Attorney for Plaintiffs.

Filed Nov. 17, 1953.

[fol. 68] STIPULATION RE TESTIMONY OF FRED W. KELLER —Filed November 17, 1953

It is hereby stipulated by and between the parties hereto through their respective counsel that if called as a witness Fred W. Keller will testify "that ever since the year 1948, I have been and now am a member of the Advisory Board of the Utah Grazing District No. 6; that I attended a meeting of this Advisory Board on October 9, 1952, held at the office of the Range Manager, Dale Kinnaman, Monticello, Utah; that at that meeting Mr. Kinnaman reported that a program eliminating abandoned horses was underway particularly in the south section of the District, which I took to include Bluff Banks, Mustang Mesa and other adjacent ranges; that after hearing this report I proposed and there was passed a resolution approving and ratifying the abandoned horse program as it had been prosecuted up to date and as I understood it would be prosecuted thereafter."

Dated this 17th day of November, 1953.

A. Pratt Kesler, United States Attorney; Llewellyn O. Thomas, Assitsant United States Attorney, Attorneys for Defendant. Milton A. Oman, Attorney for Plaintiffs.

Filed Nov. 17, 1953.

IN UNITED STATES DISTRICT COURT

Reporter's Transcript of Testimony and Proceedings.—Salt Lake City, Utah, November 17, 1953, 10:00 A.M.

Appearances: MILTON A. OMAN, JOSEPH Y. LARSEN, JR., attorneys for plaintiffs; LLEWELLYN O. THOMAS, Assistant United States Attorney, OTTO AHO, representing the defendant.

COLLOQUY BETWEEN COURT AND COUNSEL

The Court: Hatahley and others against the United States. Are you ready?

[fol. 69] Mr. Oman: We are ready, Your Honor.

Mr. Thomas: We are ready, Your Honor.

The Court: You may proceed.

Mr. Thomas: If Your Honor please, counsel for plaintiffs and counsel for the defendant have entered into stipulations. Two of the stipulations have been signed. I wonder what the Court would suggest? May we file those with the clerk?

The Court: Let me see them. I am going to have to know what is in them, I guess.

Mr. Thomas: I could explain briefly, if Your Honor please.

They have to do, one with the testimony of Judge Fred Keller, that were he here he would testify with respect to a meeting of the Advisory Board having charge of this district, Utah Grazing District No. 6, and the authorization by that board of the elimination of the abandoned horse program.

The Court: You offer this stipulation?

Mr. Thomas: Yes, we offer the stipulation.

The Court: The other stipulation deals with what?

Mr. Thomas: That deals with a number of matters. Should we read that into the record?

The Court: You don't need to read it in the record. We will file it. No need duplicating that. We will receive the stipulation with respect to Judge Keller's testimony. The second stipulation, which is concerned with a number of matters, is received. I will hand these to the clerk and he will file them.

Mr. Thomas: If Your Honor please, I would like to ask the privilege of amending the Answer of the defendant at this time, having to do with the statutes referred to in the said Answer. On the second page of the Answer, if the Court please, in paragraph 2, the Answer refers to the laws of Utah and sets out Title 4, Chapter 13, Section 3. Upon examination with reference to the particular title in the Utah Code Annotated, 1953, I would like to amend that [fol. 70] to refer to Title 3, Chapter 5, Section 115, Utah Code Annotated 1943, in view of the fact that these acts took place in 1952, before the 1953 statute was in effect.

The Court: Does that apply to all of these sections?

Mr. Thomas: That applies to all of them.

The Court: It doesn't say anywhere here.

Mr. Thomas: It doesn't say anywhere what particular code it has reference to.

The Court: Just says "Title 4, Chapter 13, Section 3"—others to the same effect, without indicating which. What you want to do is amend by inserting what language at what point?

Mr. Thomas: Under paragraph 2 I would like to amend that to read, "Title 3, Chapter 5."

The Court: Title 3, Chapter 5 instead of 13?

Mr. Thomas: That is right, "Section 115, Utah Code Annotated, 1943." The second designation to read, "Title 3, Chapter 5, Section 116, Utah Code Annotated, 1943." The third designation, "Title 64, Chapter 2, Section 1, Utah Code Annotated, 1943."

The Court: All right.

Mr. Thomas: The fourth designation to add, "Title 64."

The Court: When you say add, you mean this is a new one?

Mr. Thomas: I apprehend, if Your Honor please, that some of these acts did take place in 1953, and so I don't want to delete what is there already.

The Court: You don't want this stricken out?

Mr. Thomas: No; I want to add the 1943 Code with the 1953, and indicate which is the 1953 Code, if the Court please.

The Court: Let's get straight about this. The sections that are there already in the Answer are in the 1953 code?

Mr. Thomas: Yes.

[fol. 71] The Court: What you are doing is adding above each one the section in the 1943 code?

Mr. Thomas: Yes.

The Court: All right. Now, title 64 what?

Mr. Thomas: "Chapter 2, Section 2, Utah Code Annotated, 1943." The next, add "Title 64, Chapter 2, Section 3, Utah Code Annotated 1943." The next, add "Title 64, Chapter 2, Section 4, Utah Code Annotated, 1943." The next is on the third page——

The Court: There is one at the bottom of the page that you haven't covered yet. You have given me one, two, three, four, five additions. Now you have "Title 47, Chapter 2, Section 4," at the bottom of page 2.

Mr. Thomas: That is the one I just read. That should be, "Title 64, Chapter 2, Section 4."

The Court: What is the one above that, then?

Mr. Thomas: That is "Title 64, Chapter 2, Section 3."

The Court: I am not going to do this by interlineation. Unless objection on the other side, I will require you to file an amended Answer. I am not following this.

Mr. Thomas: I ask the Court's indulgence in this case. I didn't prepare the Complaint—

The Court: You see, what we have done—you have lost me. I have here, one, two, three, four, five changes. Now we come to the last one on the page. You say that is the same as the one before. It really should not be.

Mr. Thomas: No, it should not.

The Court: The one before is Section 3, the last one is Section 4. Must be equivalent references in each year. Is there any objection to permitting these amendments?

Mr. Oman: I don't understand that will delay the trial?

The Court: Not at all, no. It is going to expedite the trial. We are going to quit fooling around, and let you file the amendments to show those changes you want.

[fol. 72] Mr. Oman: No objection.

Mr. Thomas: When should the amendments be filed?

The Court: How much time do you want?

Mr. Thomas: Could we prepare it now?

The Court: No, we are going ahead with the trial. Don't need to prepare it now. You may amend, and get your amendments in before the close of the trial, because I am going to decide this case on the evidence submittted.

Mr. Thomas: Now I have submitted to counsel, if Your Honor please, a list of activities on the part of the defendant's agents, indicating as to date. I have submitted those to counsel and he is agreeable to stipulate that that is the fact, that these items indicated in this document are facts respecting the activities of the defendant.

The Court: You better have that marked. Have you written out a stipulation?

Mr. Thomas: No, I haven't. With respect to this we apprehend it would be necessary to read it into the record. Would the Court feel that would be necessary?

The Court: Let's see it. I want to save all the time we can. Just have it marked, and show it to the other side. If you agree that should be received to establish the facts there presented, we will receive it.

(Defendant's Exhibit A was thereupon marked by the reporter for identification.)

Mr. Thomas: You have a copy of that, Mr. Oman, I believe?

Mr. Oman: Yes, I have.

Mr. Thomas: This may be received in evidence?

Mr. Oman: It may be received, with this understanding, so no possible misunderstanding about it. We don't conclude that this represents the only things that happened during the period of time covered. We shall go forward and show what other and additional acts were committed, what additional horses might have been taken.

[fol. 73] Mr. Thomas: So it may be understood, the period contemplated by the plaintiffs is one year prior to March 20, 1953, is that correct?

Mr. Oman: I believe that is the date, Mr. Thomas.

The Court: March 20, 1953, is the date of the filing of the Complaint in this case. Now you say the period in question is one year prior to that date?

Mr. Thomas: That is correct.

The Court: Do you agree, Mr. Oman?

Mr. Oman: Yes, Your Honor.

The Court: Is Mr. Oman's stipulation satisfactory to you?

Mr. Thomas: That is satisfactory.

The Court: Defendant's Exhibit A will be received in evidence.

(Defendant's Exhibit A was thereupon received in evidence.)

The Court: As I understand the stipulation, this is not a stipulation that the witnesses will so testify. This is a stipulation that the facts are as represented in Exhibit A.

Mr. Thomas: That is correct. Now, if Your Honor please, there was a pretrial hearing in this matter, and the Court reduced the issues in the matter to: first:

(Reads.)

"Whether or not there has been wilful and malicious destruction, or deprivation of possession for a period of time, of the horses and burros of the Indians by agents and employees of the United States Government.

(2) Whether or not the agents and employees of the United States had legal justification, in the destruction or deprivation of possession of said horses and burros of the Indians, arising out of the manner in which they cooperated with the county commissioners under the state statutes.

[fol. 74] (3) Whether or not the employees of the Bureau of Land Management, in the destruction or deprivation of possession of the said horses and burros, were in the exercise of a discretionary function, within the exception of the Tort Claims Act.

(4) What, if any, damages the plaintiffs are entitled to recover herein."

Now, I wondered if the Court felt that we should argue the matter incorporated in paragraph 3, before the taking of testimony, in view of the—

The Court: No, no; we are not going to have any argument until we get all the evidence in.

Mr. Thomas: With respect to No. 4, if Your Honor please, I was a little disturbed as to just the nature of the claim for damages, and I called upon the reporter who reported this pretrial proceeding respecting the damages, and it is agreed by counsel that at that time this took place:

(Reads.)

"The Court: The only property to which you claim damage is the Indian horses, is that it?

Mr. Oman: Horses and burros.

The Court: You claim those were destroyed wilfully and maliciously?

Mr. Oman: Yes.

The Court: By agents of the United States Government?

Mr. Oman: That is right."

Mr. Thomas: Now, I take it the issue here is, then, that the damages have to do with the alleged wrongful taking of horses and burros?

The Court: What else would it have anything to do with?

Mr. Thomas: I can not imagine anything else. I would like to have that understood.

The Court: If the evidence shows here that these plain-[fol. 75] tiffs are entitled to recover any damages, that paragraph is enough to entitle them to do it. We framed the issue. You people were served with the Order, and you had five days in which to suggest amendments, and you did not do it; and paragraph 4 stands in the pretrial conference order just for what it says: "what if any damages the plaintiffs are entitled to recover in this case."

They are going to be permitted to prove any damages they can that flow from the alleged wrong. It is not limited to horses and burros, or anything else. Any damages they can prove that flow from the wrongs they can establish in the evidence here are going to be tried out. All right, go ahead.

Mr. Oman: If Your Honor please, I have discussed the matter with defendant counsel, I should like to make a minor amendment to the Complaint by adding thereto the name of one plaintiff who was inadvertently omitted, that is Tom Belatso; and by changing the number of horses as shown on the second line in paragraph 6 from 104 to 115.

The Court: Any other amendment?

Mr. Oman: That is the only amendment.

The Court: Any objection to this being made by interlineation?

Mr. Thomas: No objection.

The Court: It may be so amended.

The Court: You don't need to make any statement. Just put your evidence on.

Mr. Oman: We would like to call first one of the government agents in this matter, Your Honor, as a hostile, unwilling witness. And we wish to question him as such.

The Court: All right.

(Thereupon the plaintiffs, to sustain the issues upon their part, gave in evidence the following.)

[fol. 76] DALE HERBERT KINNAMAN testified as follows:

Direct examination.

By Mr. Oman:

Q. Will you state your name, please?
A. Dale Herbert Kinnaman.
Q. Where do you reside?
A. Monticello, Utah.
Q. For what period of time have you resided there?
A. Since 1946.
Q. Where, by whom, and in what capacity are you employed?
A. I am range manager of the Grand and Monticello Grazing Districts.
Q. Have you been such during all the period of time since 1946?
A. With the exception of a short period during the summer of 1946 and 1947.
Q. You are one of the parties named in the Complaint filed in this action as an employee of the government?
A. Yes sir.
Q. You are the direct supervisor of Mr. Dee Black?
A. Yes sir.
Q. For what period of time have you been supervisor of Mr. Black?
A. Approximately three years.
Q. Have you during that period of time had other employees under your supervision?
A. Yes sir.

Q. Will you name them?
A. Yes sir.

Mr. Thomas: I object to this as being immaterial, incompetent and irrelevant, not pertinent to the issues of this matter, too remote.

Mr. Oman: It is possible there might be other field employees who aided and assisted in the commission of the acts of which we complain.

The Court: Are there any others who aided and assisted you fellows in doing what is complained of here?

The Witness: Yes sir.

The Court: Name them.

A. Robert Krumm.

By Mr. Oman:

Q. In what capacity was he employed?

The Court: Let's get them all in. Name them all.

The Witness: That is the only one that assisted me in the abandoned horse program.

[fol. 77] By Mr. Oman:

Q. What is his capacity?
A. He is range manager, assistant to me.
Q. Assistant range manager?
A. His title is range manager. He is assistant to me in that office.
Q. For what period of time has he been in that position under your supervision?
A. About a year and a half, I believe.
Q. Mr. Kinnaman, we have stipulated that Mr. Newman —Kelso P. Newman—is your direct supervisor, and that H. Byron Mock is also your supervisor, and the supervisor of Mr. Newman. Is Otto Aho a supervisor of you in any capacity?
A. No sir.
Q. What is his position?
A. He is regional counsel.
Q. Over what area does he have jurisdiction?
A. The states of Colorado and Utah.

Q. And this district is in Utah?
A. Yes sir.

The Court: Resident counsel for the Bureau of Land Management?
The Witness: Yes.
The Court: Did he advise with you about this business—about the plaintiffs' complaint?
The Witness: No, he did not.

By Mr. Oman:

Q. Did any of your supervisors advise with you about the acts of which we have complained?
A. No sir.
Q. Did you determine on your own initiative to take this action?
A. I did.
Q. And your supervisors knew nothing about it?
A. Yes, he did.
Q. What did they know about it?
A. I wrote three letters requesting advice on the matters, and later on in conversation mentioned the abandoned horse program.
Q. In conversation with whom?
A. Mr. Newman.
Q. Was Mr. Aho present?
A. No.
Q. Who else was present?
A. No one that I remember.
Q. Did Mr. Newman approve your program?
A. I didn't ask him for approval.
Q. Did he reject your program?

The Court: Let's have the whole conversation with any [fol. 78] of these people. The proper way to do is to find out with whom he had conversation, where he was from—
Mr. Thomas: In the interest of time we would like to indicate that we have no desire to deny this authority to do, as the agent of the government, of the Bureau of Land Management, what he did—what they actually did in this case.
The Court: Does that satisfy you?

Mr. Oman: No, it does not. I want to know who of these government agents were involved in this matter.

The Court: All right.

By Mr. Oman:

Q. You say you had conversation with Mr. Newman. Where was that held?

A. In Salt Lake City, in his office.

Q. On what date?

A. I couldn't tell you exactly, but it was shortly after the program had been in effect.

Q. When did it go into effect, in your opinion?

The Court: I don't care anything about his opinion. Was it before or after the acts of which the plaintiffs here complain?

The Witness: It was after—pardon me, no—I didn't quite get your question.

The Court: Was it before or after the acts of which the plaintiffs complain, damage that destroyed their horses?

The Witness: It was before the Complaint was filed.

The Court: Was it before you fellows rounded up the horses?

The Witness: It was shortly after we started the program.

The Court: The plaintiffs complain that you fellows destroyed some of their horses and burros. What we want to know, was this conversation with Newman before you went down there and destroyed these horses and burros, if you did?

The Witness: It was shortly after the program started, and we had gathered some of the horses.

[fol. 79] The Court: Had you gathered all of them?

The Witness: No sir.

The Court: It was in process, that is to say?

The Witness: The program was in process, yes.

By Mr. Oman:

Q. Can you tell us about what date, then?

A. I believe it was in September or October.

Q. 1953?

A. Yes.
Q. Who was present?
A. Mr. Newman.
Q. Any other persons present?
A. Not that I recall. I don't believe there was anyone there.
Q. Will you tell us what you said to Mr. Newman in regard to this program, and what he said to you?——
A. I informed him of the fact we had started the abandoned horse program; it was in the process.
Q. Did you tell him what you were doing?
A. Yes.
Q. What did you tell him?
A. I told him we had the abandoned horse program in effect.
Q. Did you tell him what area you were covering with this program?
A. I don't believe I mentioned the area we were covering. It included the entire county.
Q. Did you tell him you were in the process of getting rid of the Indians' horses?
A. I don't think I said anything like that, no.
The Court: Tell us just what you said—all you said—everything you said.
A. I believe the only thing I mentioned was that we had the abandoned horse program in effect, that we were gathering those horses.

By Mr. Oman:

Q. Did you tell him what you were doing with them?
A. We were rounding them up, yes.
Q. Did you tell him how you were rounding them up?
A. No.
Q. Did you tell him what disposition you were making of them?
A. I don't believe I did. I just told him we were in the process of rounding up these horses, and the abandoned horse program. I think that is about what I said.
Q. What did he say to you?
A. I don't recall that he said anything.
Q. He is your direct supervisor, isn't he?
A. Yes sir.

[fol. 86] Q. Under the obligation of authority he could have required you to terminate the program, is that correct?

Mr. Thomas: That is calling for a conclusion.

The Court: Sustained.

By Mr. Oman:

Q. What is the nature of the work which is done by Mr. Black under your supervision?

A. His title is range aid. He rides the range, checks anything with respect to our range management program, or range improvement program, timber or otherwise.

Q. Anything which relates to the physical use of the range and the control of that, is that what he does?

A. Yes sir.

Q. With Mr. Krumm, is that likewise what he does?

A. Yes sir.

Q. Mr. Kinnaman, will you describe the area from which you took the horses to which we have stipulated here?

Mr. Thomas: If the court please, we have a map of this area. If that might aid the court, we would be happy to produce it.

The Court: No, if these fellows go for the plaintiffs' horses and kill them, I don't see that it makes any difference where they did it.

By Mr. Oman:

Q. Will you describe that area, Mr. Kinnaman?

A. Yes sir. It can be described this way, that it is north of the San Juan river and north of the Navajo Indian Reservation, as far north as somewhere around, I would say about fifteen or sixteen miles from the state line of Colorado-Utah. One bunch of horses was gathered west about eighty miles.

The Court: He asked you where you destroyed them.

The Witness: I can't describe that specifically, because I wasn't active in that part of the program myself.

By Mr. Oman:

Q. The area, then, runs along the north boundary of the Navajo Indian Reservation for possibly fifteen miles to the north?

A. Yes.

Q. Now, all of the horses were taken out of that area, you say, except one small bunch?

A. Yes. Then there was another bunch that was way west of there.

[fol. 81] Q. Are there any privately owned lands within this area you just mentioned, Mr. Kinnaman?

A. Yes.

Q. Are any of them owned by the plaintiffs?

A. Not to my knowledge.

Q. You have concluded they own no land in that area?

A. Yes.

Q. Do any Indians own land out in this area?

Mr. Thomas: I object to it as being immaterial.

The Court: Overruled.

A. There are some Indian lands in that area, yes, and they belong to the Ute tribe.

By Mr. Oman:

Q. Under whose control are they—do you know that?

A. They are under the control of the officer in Ignacio, Colorado.

Q. Do you know whether they are leased to any of these plaintiffs?

A. Some of the lands, about eight hundred acres of land, that lies next to the Colorado line, that was leased, yes—not to the plaintiffs.

Q. Do you know about the ownership within this area of about eight hundred acres, owned by Jim Joe's daughter?

A. I don't know who the Ute Indians were that owned the land, no. But I am acquainted with who the lessee was during that time.

Mr. Thomas: If the court please, may I call attention to the stipulation? The stipulation just received indicates, in paragraph 1, that the land involved here consists of federal range set apart for grazing, and is located within the Utah Grazing District No. 6, established by the order of the Secretary of the Interior, so it is stipulated that the area from which these horses were taken is federal range—has nothing to do with any private range.

The Court. No, I don't think this stipulation prevents

them from going beyond—that was the understanding, the stipulation of these facts, then he may go beyond that to establish other facts if he wants to.

Mr. Thomas: That had to do with Exhibit 1, if the court please, only. I understood the range within this area was federal range; that is paragraph 1.

The Court: Go ahead, Mr. Oman.

[fol. 82] By Mr. Oman:

Q. Did I understand you to say you didn't know where the horses were destroyed?

A. Not specifically, no sir.

Q. Do you know in a general way where they were destroyed?

The Court: Let's find out more about that. Were you there when they were destroyed?

The Witness: No, I wasn't.

By Mr. Oman:

Q. Not in any case?

A. No.

Q. Did you advise and approve the acts which your subordinates had to do in connection with this program? Did you tell them how to do this?

A. I told the boys to follow the state law specifically.

The Court: You directed them to go out and round up the horses and burros, didn't you?

The Witness: Yes, sir.

By Mr. Oman:

Q. Did you direct them to kill them on the range if they couldn't round them up?

A. If it was necessary; I told them to take any steps necessary within the limitations of the state statutes under which they were operating.

Q. You included in that, in your own mind, at least, that they should kill them if they had to?

A. I concluded in my own mind, yes, if that is what you mean.

Q. Did you furnish them rifles and ammunition with which to do that work?

A. I didn't furnish them any rifles, but we furnished them ammunition, yes.

Q. What kind of ammunition did you furnish?

A. You mean as to what?

Q. Rifles, shotguns—what did you use?

A. We used rifles.

Q. What caliber?

A. 30-6; 30-30.

The Court: Did this happen while the lawsuit about that matter was pending in this court?

Mr. Oman: Your Honor——

The Court: I want you to ask that as a question. This may not only be a damage claim; somebody may be in trouble with this court.

[fol. 83] Mr. Thomas: Does the court refer to the case of the government versus these Indians?

The Court: Yes, the Bureau of Land Management.

Mr. Thomas: I believe that was dismissed in June of this year, wasn't it?

The Court: I don't know when it was dismissed. I want the evidence to disclose whether this deprivation, if it turns out to be that, was done, if you know, when there was a case pending in this court to determine the rights of these Indians to that land; because if it was, and performed by the Bureau of Land Management, we have a very serious matter here.

By Mr. Oman:

Q. Mr. Kinnaman, you are acquainted with the plaintiffs in this action, are you not?

A. There is a few in here I am acquainted with, that is all.

Q. Will you name those with whom you are acquainted?

A. To be right frank with you, I haven't reviewed the plaintiffs enough to remember the names, even.

Q. You see them here. Don't you know these Indian people?

A. No sir, I don't. I know a few of them.

Q. How many do you know?

A. Two or three I can see.

Q. You know where they have lived during the time you have been in this grazing district, don't you?

A. Partially.

Q. That has been within the area you have just described?

A. Part of the time, I guess.

Q. When you first came into this grazing district these Indians were upon the range you have described, v. their livestock, were they not?

A. Some of them.

Q. And have continued there down to the present time, haven't they?

A. Not to the present, no.

Q. Isn't Sakezzie still there?

A. He lives there.

Q. Does he have his livestock in the immediate vicinity of his hogan every day?

A. To the best of my knowledge he has. You might call it the immediate vicinity.

Q. When did the others, if you know, cease to live there? [fol. 84] You indicated they don't live there right now.

A. I don't know where they live right now.

Q. You say they don't live within this area from which you gathered and destroyed their horses, is that true?

A. I don't know where they live.

Q. Do you know where they don't live? Do you know they don't live in this area from which you collected——

The Court: He says he doesn't know where they live.

A. I don't know where they live.

By Mr. Oman:

Q. They could be in this area as far as you know?

A. Yes.

Q. During the period of your employment in this district, Mr. Kinnaman, they have raised sheep and cattle and goats and horses throughout this range area, have they not?

A. Yes.

Q. And you had issued to them or in behalf of them licenses or permits covering that use for a period of time in the past, is that true?

A. Yes, seven Indians.

Q. Down to what year?

A. Would you repeat that, please?

Q. You stated you had issued them permits and licenses. I asked, down to what year had they been issued to them.

A. The year 1947 inclusive, I believe.

Q. Since then you say you haven't issued them permits or licenses?

A. No.

Q. But they nevertheless continued to graze the area?

A. Yes.

The Court: He said there were seven—is that right?

The Witness: Yes.

The Court: Who were these seven?

The Witness: Eddie Nocki was one. S. P. Jones was another. Jim Joe, Randle Benally, Hosteen Sakezzie—how many is that?

Mr. Thomas: That is five. Did you have Hosteen Sakezzie?

The Witness: Didn't I say that?

The Court: Is he one of them?

[fol. 85] The Witness: I believe he was. Nocki, Denet, Begay——

By Mr. Oman:

Q. Mr. Kinnaman, what reason did you have for taking the action you did to eliminate these Indians' horses?

The Court: That is immaterial.

By Mr. Oman:

Q. When did you determine to eliminate these Indians' horses?

A. About the last few days of June.

Q. What year?

A. 1952.

Q. And then, when did you begin destroying these horses?

A. In September of 1952.

Q. Do you remember what date you made the first roundup? Is that the date you have shown on the stipulation?

A. Yes—September 19th.

Q. Had you had previous difficulties in any way with these Indians, these plaintiffs?

A. With respect to the horses? Is that what you mean?

Q. Yes, with respect to the horses.

A. Yes.

Q. What had you done? What difficulties had you encountered?

A. In 1947 we advertised an abandoned horse program; and again in 1950.

Q. Did you do anything with these Indians at that time?

A. No, we didn't.

Q. They stayed right there, didn't they?

A. No, they didn't. They got the horses and put them some place, I don't know, but the range was cleared of horses. Later on, came back.

Q. When, do you know, were the horses taken out?

A. That I couldn't tell you.

Q. Do you know how long they were kept out?

A. No, I couldn't tell you that.

Q. You didn't ride the range yourself?

A. I did sometimes, yes.

Q. In just your car?

A. No, I had a horse; a car and a horse.

Q. Whenever you did, you found those horses there, didn't you?

A. Sometimes. Shortly after the program was advertised, the horses would not be there. Then later on, two or three months later, they would all come back.

[fol. 86] Q. So you knew who owned those horses all those years since 1946, didn't you?

A. No sir. I did not.

Q. You knew these Indians owned the horses, didn't you? You knew the Indian people who lived in that area owned them, did you not?

A. I couldn't specifically say they were all Indians horses.

Q. You knew a great many of them were Indian horses, if not all of them, didn't you?

A. That wa assumed.

Q. You knew that you had given these fellows permits to run them?

A. I couldn't say they were all Indian horses, no.

The Court: Did you know the Indians owned some horses there?

The Witness: Yes, I did.
The Court: And some burros?

By Mr. Oman:

Q. Do you have any records to show how many of these horses were destroyed under your program during the time covered in this case?
A. Yes, we do.
Q. What is the total number you destroyed?

The Court: Let's find out if he has the record.
The Witness: Yes, we have the record.
The Court: Where is it?
The Witness: Mr. Thomas has it.
The Court: Turn it over to counsel.
Mr. Thomas: This is the stipulation. This shows what horses were killed, what horses were sold, what horses were returned to the alleged owners.
The Court: Do you want to go beyond that?
Mr. Oman: I will clarify that.

Q. Is it your position that these are the only horses and burros which you destroyed in this program?
A. There were some horses redeemed.
Q. I say, the horses that you destroyed.

The Witness: Does your question mean that would be just the ones that I would refer to, just the ones that were destroyed?
[fol. 87] The Court: That he says is, Mr. Kinnaman, is this: he wants to know if the horses and burros which are referred to in Exhibit A in this case—hand it to the witness. Now, Mr. Oman is asking you whether the horses and burros referred to in that exhibit were the only horses and burros which you destroyed in this abandoned horse program.

A. Yes. This is an itemized account of all the field activities during this time.

By Mr. Oman:

Q. That doesn't include the horses you shot down on the range, does it?
A. Yes, it states right in here.

Q. They were the only ones? You wish that to be your testimony? Those listed in that Exhibit A are the only horses you destroyed in this program?

A. The only ones that I have any knowledge of.

Q. Do you know the total of the horses listed in that exhibit?

The Court: No—it is in evidence; we can add them up.

By Mr. Oman:

Q. Now, Dale you operate under the Taylor Grazing Act and under the Federal Range Code, do you not?

A. Yes sir.

Q. Your Federal Range Code is a set of regulations that the Bureau of Land Management has written to guide you field men in your work of administering the activities on the range?

A. Yes, sir.

Q. That code directs what you shall do when you find livestock trespassing on federal range, doesn't it?

A. Yes, sir.

Q. And what are you directed to do when you find livestock in trespass?

A. Section 10 (a), 1 and 2, of the Federal Range Code, states you shall serve a notice upon the trespasser.

Q. You shall do that personally or by registered mail, must you not?

A. Yes.

Q. Did you do that with any one of these plaintiffs?

A. We did in some instances, yes.

Q. You did?

A. I believe we did.

Q. On whom did you serve any notice of trespass in the year concerned in this action?

A. I can't recall who they were.

[fol. 88] Q. You have your files there, don't you?

A. Yes.

Q. Can't you get them?

A. They are over there against the door.

Q. Don't you recall—to save time?

A. Recently?

Q. Within the time covered in this action. You know what period of time that is, do you not?

A. Yes.

Q. Did you do that with any of these people?

A. No.

Q. You didn't do it, did you?

A. No, I didn't.

Q. After you served trespass notices, if you did——

The Court: What is it he didn't do?

Mr. Oman: He didn't serve any of them with any notice that they were violating any provisions of the Federal Range Code by being on this land he calls federal range.

Q. What is your usual procedure where you find animals trespassing on what you believe to be public land? Carry on through and explain to us what your procedure is from the time you first observe the horses until you terminate the case.

A. If a man is in trespass with his livestock and we know who the individual is, we serve him with a notice and he has the opportunity of getting back on his own allotment, or doing whatever is necessary to abide by the regulations. If he does not, then he is expected to comply with the terms of his license. If he doesn't then the matter can be turned over to the proper authorities for correction.

Q. If he doesn't, you eventually bring it in to the United States Attorney, don't you?

A. Yes.

Q. You had brought a case in here to the United States Attorney back in about 1950, specifically to get the livestock owned by these Indians moved from the range, had you not?

A. Yes.

Q. You discussed that case, the information you had, with Mr. Abo, regional counsel—with your superior officers?

A. Yes.

Q. Together all of you discussed it with the United States Attorney, did you not?

A. Yes.

Q. Asked him to take some action to get them off the range?

A. Yes.

Q. Now, that action did come before this court and you [fol. 89] were aware of that, weren't you, Dale?

A. Yes, I was.

Q. And you knew what action this court took in this case, did you not?

A. Yes.

Q. Then you knew, too, that while this case was still before this court that you had gone ahead to shoot or otherwise destroy these horses on this same range from which you had already asked this court to eliminate them? You knew that, did you not?

A. I don't remember all the particulars with respect to how the abandoned horse program coincided with this court case.

Q. It didn't make any difference to you, did it, Dale?

A. I think at the time this abandoned horse program had been placed in effect it was no longer questionable about the status of the land.

Q. You had not gotten the horses eliminated by the case you had brought in this court, had you?

A. No.

Q. So you decided to go ahead and take it into your own hands, did you not?

Mr. Thomas: I object to that as improper.

The Court: Overruled. He may answer.

The Witness: Would you repeat the question?

By Mr. Oman:

Q. So you decided that was too slow, that you would take the matter into your own hands and get rid of these horses?

A. We decided to put the abandoned horse program into effect, yes.

Examination.

By the Court:

Q. Even though this case was still pending in this court?

A. I wasn't familiar with what the status of the case was at that time.

Q. You didn't inquire, did you? You knew you started one here, didn't you?

A. Yes.

Q. You knew it was being handled through your Regional Office up here, didn't you?

A. Yes, sir.

Q. And the United States Attorney's office. You knew it concerned that land the people occupied, didn't you?

A. Yes.

Q. And their livestock—you knew that, didn't you?

A. Yes.

[fol. 90] Q. Before you destroyed those horses did you inquire whether that lawsuit was ended or not? Just answer that question.

A. I don't recall that I did.

Q. You recall that you did not, don't you?

A. I don't think I did.

Q. And you went ahead, regardless of the proceeding here; is that right?

A. Yes, I went ahead, thinking I knew the status of the land at that time, that I was acquainted with the proper ownership of the land at that time.

The Court: I suggest to you, Mr. Oman, that there is a statute in Crimn. l Code about obstructing justice. A man was recently indicted in this district under that section. I refer you to it. And I refer the United States Attorney to it.

By Mr. Oman:

Q. Dale, who prepared for you any notice which you might have furnished to the San Juan Record newspaper?

Mr. Thomas: I object to that as being immaterial, if your Honor please.

The Court: The objection is overruled. He may answer.

A. The notice that went into the paper?

Q. Yes.

A. That was given by the county commissioners.

Q. Who prepared it?

A. The resolution, or the notice?

Q. The notice, itself. You took it over there, didn't you?

A. Yes.

Q. And you had it prepared in the Regional office, didn't you?

A. No, I did not.

Q. Where did you have it prepared?

A. The actual notice that went in the paper, that is copied right out of the state law.

Q. Who copied it—who furnished it to you? Answer that question, Dale.

A. I think our clerk made a copy of the notice.

Q. But you don't know?

A. I am not sure; I don't remember.

Q. You took it over there, didn't you?

A. I didn't take it over to Dove Creek. I took it to [fol. 91] their office where they had a representative there, and so I saw to it that it got to the Dove Creek address.

Q. You took it to the representative there in Monticello?

A. Yes.

Q. They took it to Dove Creek?

A. Yes.

Q. Who paid for it?

A. The county commissioners.

Q. How do you know that? You are sure you did have the advisory board pay for that?

A. Yes, I am sure.

Q. What were your instructions about the killing of these horses? Did you tell them to kill anything that would cause them any work to get them in with a truck and be easier to shoot them than put them in the trucks?

A. No, I didn't tell them that.

Q. What did you tell them about shooting them?

A. I told them to abide by the state law.

The Court: What I want you to do is tell us—forget about the law for a minute—tell us what you told them to do about shooting these horses.

A. I told them, I believe, that they should not kill any animals unless it was necessary.

By Mr. Oman:

Q. What did you mean by that "*necessary*"?

A. Could be any number of reasons for that.

The Court: Tell us what you told them.
The Witness: I believe that would cover the subject.

By Mr. Oman:

Q. You left it up to their judgment then, didn't you?
A. Substantially.
Q. And you furnished the ammunition?
A. Yes.

The Court: The court will be in recess for five minutes.

(Recess.)

(Hearing resumed.)

By Mr. Oman:

Q. Mr. Kinnaman, the stipulation, Exhibit A, indicates that you sold practically all of these horses to the Kuhni Packing Company. Where are they located?
A. Springville; out of Provo a ways.
Q. You knew in advance that the horses would there be killed, didn't you?
A. Yes.
[fol. 92] Q. It was, of course, your plan to have these horses killed one way or another?
A. Not necessarily, Milt.
Q. You furnished rifles to take care of those you couldn't ship out of the district to this packing plant?

Mr. Thomas: I object to that as argumentative.
The Court: Overruled. This is a reluctant witness.

By Mr. Oman:

Q. Isn't that true?

The Court: Perfectly obvious from his demeanor on the stand and his answers.

A. That is not true, Milt.

By Mr. Oman:

Q. What did you do with the rest of them?
A. These horses that were gathered, if the ownership could be determined they would have the opportunity to redeem those animals.

Q. You didn't make any effort to determine ownership—you knew that already, didn't you?

A. I did not.

Q. Of course you say you had already filed an action here to get rid of these Indian horses and have them taken off this very piece of range, so you knew whose horses you were gathering?

A. I did not, with the exception of those that were redeemed.

Q. You didn't know the individual Indian, which horse was his, is that what you mean?

A. No, I did not.

Q. You knew they belonged to these Indians, didn't you?

A. I couldn't swear to that, no sir. They were abandoned horses.

Q. That is what you concluded?

The Court: That is a conclusion of the witness. It is stricken from the record.

By Mr. Oman:

Q. Did you use a government truck in shipping these horses?

A. Some of the time we did.

Q. And some of the time you used a private truck?

A. Yes, sir.

Q. Who paid for the truck?

A. The advisory board, generally.

Q. Whatever they do is done with your direction and [fol. 93] approval—anything that anybody does on the federal range, isn't it?

A. Yes, sir.

Q. Did you receive any money back for these horses?

A. The advisory board did, yes sir.

Q. Do you know how much?

A. Within a period I can't say specifically. We have an account, if it is here in the files.

Q. You don't know an approximation of how much money they received?

A. I would imagine around fifteen hundred dollars, something like that.

Q. Dale, do you remember being contacted by a person in behalf of Sakezzie requesting that his horses be returned?

A. No, sir, I do not.

Q. You do not?

A. No, sir.

Q. Were you contacted by anyone in behalf of any of these plaintiffs?

A. I was on one occasion.

Q. What occasion was that?

A. That was a fellow named Wheeler. He is a white trader at the mouth of Montezuma. He came there one evening and told me about one horse that belonged to one of the Indians.

Q. Is that the only contact you had?

A. That is the only contact I ever had, yes sir.

Q. The only request you ever had to find out what happened to the horses?

A. Within this time covered here.

Q. Have you had any any other time?

A. Subsequent to this federal, yes.

Q. You mean you went right on killing the horses even after this case was filed with which we are here concerned?

A. I don't recall that we killed any horses, no.

Q. Did you ship any?

A. Yes.

Q. You had them destroyed in the same way, then—is that true?

A. Yes, there were some that were shipped.

The Court: You didn't pursue your question whether there was any discussion with anybody who had made a request to have an opportunity to redeem.

Mr. Oman: He said that was the only one.

The Court: No, during the period—then you asked him, was there any such request at any other time.

By Mr. Oman:

[fol. 94] Q. For the period of time subsequent to the filing of this action were you contacted by or in behalf of any of these plaintiffs that you return to them their horses?

A. None of the plaintiffs, no.

The Court: I don't think you have exhausted that subject, Mr. Oman. Let's pursue that.

By Mr. Oman:

Q. Were you contacted by any Navajo Indian?
A. No, sir.

The Court: By anyone who represented them, who contacted you on behalf of them?
The Witness: No, sir.
The Court: Did anybody ask you for an opportunity to get his horses, after you had driven them off?
The Witness: Yes, sir.
The Court: Tell us everyone who at any time talked to you about that matter.
The Witness: There were four or five Ute Indians that came there to Monticello to redeem their horses, but I can't recall their names. They got their horses back.

By Mr. Oman:

Q. You don't recall their names?
A. No, I don't.
Q. Don't recall the date?
A. I think it was in September, this last September.
Q. September of 1953?
A. 1953.

Q. Now, Dale, in your program to destroy these plaintiffs' horses, you followed that through until you had eliminated all horses and burros from this range, didn't you?
A. I can't answer that question. I don't know whether there is any horses out there now or not.
Q. If there are, it is not because you intended them to be left?
A. We can't devote all our time to that program, Milt.
Q. You have searched the range, haven't you, to make sure—as certain as you could—that there are none left?
A. Not recently.
Q. When did you?
A. I can't state that. Bob Krumm and Dee Black are the ones that generally do most of the range riding.
[fol. 95] Q. You continued to supervise them, get their daily reports from them, didn't you?
A. I didn't get daily reports from them, no.
Q. When did you get reports?

A. We have a session every once in a while; might be once a week or once every two weeks, something like that.

Q. Isn't that often enough? Have you decided you have got the job done now, from the search you made of the range?

A. I can't say we have removed all the horses, no.

Q. You are still pursuing this plan, is that right?

A. It wasn't made effective until recently.

Q. Any horses you find there yet you are continuing to destroy?

A. Yes.

The Court: I think you should, right now, Mr. Oman, prepare a temporary restraining order. I am not going to have this pursued any further. Pending disposition of this litigation, prepare the Order and I will sign it.

Mr. Thomas: I wonder if it might not be my duty at this time to call attention to the decision of the Supreme Court of Utah——

The Court: I know about that. That has not anything to do with the litigation pending in this court at the time these depredations were committed. I am familiar with that.

Mr. Oman: I believe that is all for this time with this witness. I may wish to recall him.

The Court: You see, Mr. Thomas, this court is a federal court, and the lands in question here are federal lands, and the plaintiffs here, who were the defendants in the suit then pending, are wards of the United States Government.

Mr. Thomas: I appreciate that, if your Honor please.

The Court: That litigation was pending here at the time these fellows took this matter into their own hands. You have a very serious situation, not just with respect to whether they recover damages; I am talking about an indictment. I am talking about contempt of this court. I am talking about obstructing justice by people who are [fol. 96] parties plaintiff to the litigation in this court—the Bureau of Land Management, taking the matter into their own hands, going out and destroying property belonging to the defendants, to a proceeding in this court which was not disposed of, which was pending here.

I am going to have the matter looked into for the purpose of calling a grand jury and have the matter presented to a grand jury. We are going to find out whether the authority of this court can be flaunted in that way.

Cross Examination.

By Mr. Thomas:

Q. Mr. Kinnaman, state whether or not you, as the federal range manager of Utah Grazing District No. 6, issued any licenses and permits for the purpose of grazing of horses or burros within one year prior to March, 1953.

A. No, sir—issued any to plaintiffs?

Q. To anyone—not to plaintiffs. You mentioned having issued permits and licenses to seven Indians down about 1947, Mr. Kinnaman?

A. Yes, sir.

Q. Were those permits for the grazing of horses or burros?

A. They were for the grazing of sheep and goats and some horses.

Q. I call your attention to Exhibit A in this case, that you have in your hand. Did you personally go on any of the trips indicated in that exhibit?

A. I went on one.

Q. What date was that? You may examine it to refresh your memory.

A. That was on the 25th of September.

Q. Of what year?

A. 1952.

Q. How many horses were picked up at that time, Mr. Kinnaman?

A. Five horses and one burro.

Q. Did you know the owners of those horses at that time?

A. I didn't, myself, personally, but Dee Black knew whose the horses were.

Q. To whom did they belong?

A. To Willard Butt and Owen Oliver.

Q. Were they white men?

A. Yes.

Q. Did they redeem those horses?

A. Yes, they did.

Q. Is that the only trip you personally took as reflected by that exhibit?

A. That is the only one I took.

Q. I call your attention to Section 161.11 of the——

[fol. 97] The Court: We don't need this witness to interpret any section of the statute.

Mr. Thomas: I am going to ask him if that is the statute under which he proposed this program.

The Court: That is a conclusion of law of this witness. He has been giving us a lot of advice on the law, and very little testimony.

Mr. Thomas: If your Honor please, I am not sure whether I should go into this matter at this time or not——

The Court: You ask the question. If it is not proper, I will sustain an objection.

By Mr. Thomas:

Q. Mr. Kinnaman, state whether or not you posted any notices respecting the eliminating of horses, the so-called abandoned horses, on this range?

A. Yes, sir.

Q. Do you have any record of where you posted them, or do you know of your own memory?

A. Yes, I do.

Q. Where did you post them?

A. I posted one notice on what we call the Grizer (?) Hill turn-off just east of Monticello ten or twelve miles. Another one where the county road crosses Coal Bed Canyon. Another one on that same road that leads out into Colorado on the state line where the county road comes in at North Dale.

(Defendant's Exhibit B was thereupon marked by the reporter for identification.)

Q. I hand you what is marked Defendant's Exhibit B in this case, Mr. Kinnaman. Is that a copy of a facsimile of the notice which you had posted?

A. Yes, sir.

Q. State whether or not these points at which you posted these notices were two miles or more apart?

A. They were more than two miles apart.

Q. Were they located in San Juan County?
A. Yes, sir.
Q. When did you post those notices?
A. The 19th of July, 1952.
Q. You say you commenced this program of eliminating horses on September 19th?
A. Yes, sir.
Q. Of 1952?
A. Yes, sir.
[fol. 98] Q. Were there any other notices posted in connection with this program, Mr. Kinnaman, under your direction?
A. Yes, sir.
Q. Who posted them?
A. Dee Black.
Q. Your assistant?
A. Yes, sir.

Mr. Thomas: We offer Exhibit B in evidence, if Your Honor please.
Mr. Oman: No objection.
The Court: Be received.

(Defendant's Exhibit B was thereupon received in evidence.)

By Mr. Thomas:

Q. Now, Mr. Kinnaman, state whether or not Dee Black and Bob Krumm reported to you periodically respecting their activities concerning this elimination program.
A. They did.
Q. You were familiar with their activities, were you?
A. Yes, sir.
Q. And you approved them?
A. Yes, sir.
Q. Did they at any time advise you to whom these horses belonged?
A. No, sir.

The Court: Your whole program now—no use being disingenious about this—no use of anybody trying to fool the Court—they are going to have trouble if they try. The fact of the matter is—and I want you to inquire—the fact of

the matter is that this fellow and his associates were taking the matter into their own hands. You ask him about that. The fact of the matter is that their purpose was to drive the Indian horses off that land. You ask them about that.

By Mr. Thomas:

Q. Was your purpose to drive the Indian horses off that range alone, Mr. Kinnaman?

A. No, sir.

Q. What was your purpose respecting those horses and burros?

A. Our purpose was to eliminate all abandoned horses.

Q. Were any of those horses branded, to your knowledge?

A. Yes, sir.

Q. Were those brands recorded, to your knowledge?

A. No, sir.

[fol. 99] Q. Were some of the horses not branded?

A. Yes, sir.

Q. And the burros not branded?

A. Yes, sir.

The Court: Did you see them?

The Witness: I saw some of the horses.

By Mr. Thomas:

Q. Did you have in mind eliminating only the horses belonging to these Indians, Mr. Kinnaman?

A. No, sir.

Q. I ask you that again?

A. No, sir.

The Court: You did intend to eliminate the Indian horses?

The Witness: We intended to eliminate all the abandoned horses.

The Court: Intended to eliminate these Indian horses that were on the range at that time?

The Witness: We intended to get all the abandoned horses, irrespective of who the parties might be.

By Mr. Thomas:

Q. Who the owners might be; is that correct?

A. Yes, sir.

The Court: Who has got horses out there besides these Indians?

The Witness: In the winter grazing season?

The Court: At the time these horses were destroyed, who had horses out there?

The Witness: There were no licensed horses at that time.

The Court: The only horses out there were these Indian horses, weren't they, with perhaps a scattered wild horse or two, is that right?

The Witness: I can't say as to that.

By Mr. Thomas:

Q. I direct your attention to that exhibit, Mr. Kinnaman. Does that exhibit indicate the release of any of these horses to Piute Indians?

A. Yes, it does.

Q. Does it indicate the release of any horses gathered, to white men?

A. Yes, it does.

[fol. 100] Q. From that exhibit do you know how many horses were killed in the process of gathering them?

A. Not without a review of this, I don't.

Q. Do you recall from memory?

A. I think altogether, nine.

Q. Altogether nine?

A. Yes, if I remember correctly.

Q. Were you present when any of these horses were killed?

A. No, I wasn't.

Q. Now, during the pendancy of the action that the Court has indicated, Mr. Kinnaman, did you take this matter into your own hands to eliminate these horses?

A. During the period——

Q. During the pendancy of the action the Court has indicated—that is, the action in which the government had sought to enjoin and restrain certain Indians from grazing on the open federal range.

A. I don't get your question yet.

Q. Do you know what I mean?

The Court: He says he does not.

By Mr. Thomas:

Q. Do you know that the government filed an action?
A. Yes.
Q. Some time ago?
A. Yes.
Q. In the name of the United States Government, against certain Indians?
A. Yes.
Q. Do you know which Indians they were?
A. Yes.
Q. What were their names?

The Court: You don't need to ask him about that. He says he knows what Indians they were.

By Mr. Thomas:

Q. How many were there?
A. I believe there are seven.
Q. At the time when this elimination program was inaugurated, commenced, in 1952, did you inaugurate this program in and of yourself, Mr. Kinnaman, or did you get any counsel and advice from others in your department to commence the action?
A. No.
Q. You inaugurated it in and of yourself, is that it?
A. Yes, sir.
Q. And why? Tell the Court why you inaugurated this. [fol. 101] Because it comes within the bounds of my duty to abate these treapassers.
Q. Did you examine the range, Mr. Kinnaman, to determine what effect these horses and burros had on the range?
A. Yes, I did.
Q. Did that have anything to do with prompting your commencing this program?
A. Yes, sir, it did.
Q. What did it have to do?
A. Well, the stock that were ranging upon the range were consuming feed that was licensed to the operators that were supposed to be there, and they were stomping it out, rolling it out, destroying the forage.

Q. In connection with the inauguration of this program, with whom did you confer at the outset—in July, you mentioned, 1952?

A. I conferred with the county commissioners.

Q. Of San Juan County?

A. Yes, sir.

Q. What if anything was done?

A. They put their resolution into effect with respect to the abandoned horse program.

Q. Do you know when that resolution went into effect, Mr. Kinnaman?

A. Yes, sir.

Q. When?

A. July 9, 1952.

(Defendant's Exhibit C was thereupon marked by the reporter for identification.)

Q. I hand you what is marked Defendant's Exhibit C in this case, Mr. Kinnaman. Do you recognize that proposed exhibit?

A. Yes, I do.

Q. What is that?

A. That is the Resolution of the county commissioners of San Juan County.

Q. Dated July 9th?

A. Dated July 9th, 1952.

The Court: You are not working for San Juan County, are you?

The Witness: No, sir.

By Mr. Thomas:

Q. Why did you confer with them respecting this resolution, Mr. Kinnaman?

A. Because there is a state law that allows the county commissioners to eliminate—or to put the abandoned horse program into effect.

[fol. 102] Q. What about the federal regulation respecting that, Mr. Kinnaman? Do you know anything about that?

The Court: Is there one?

Mr. Thomas: Yes, there is.

The Court: That is a question of law.

By Mr. Thomas:

Q. Why did you go to the county commissioners, then—just state that, ~~Mr. Kinnaman~~—to get this resolution?

A. So that we could get relief on this abandoned horse problem.

Q. Was that resolution signed by the county commissioners?

A. It was.

The Court: The resolution will show, itself, if you have one.

Mr. Oman: I object to this document, if Your Honor please. The document is not dated to show what date it was considered.

The Court: The objection is sustained.

Mr. Oman: They date the resolution the 9th. They don't state when they passed it.

The Court: Let me see that document.

The Court: It says, Mr. Oman: "On this 9th day of July, 1952, the Board of County Commissioners of San Juan County, Utah, resolve and direct as follows." What is your objection to that?

Mr. Oman: My objection was there is no date to show what meeting the county commissioners held, if any, in passing that resolution.

The Court: The objection is overruled. It will be received.

(Defendant's Exhibit C was thereupon received in evidence.)

By Mr. Thomas:

Q. After this resolution was signed, Mr. Kinnaman, what if anything did you do respecting the elimination of these horses and burros?

A. We had a meeting with the Advisory Board of the [fol. 103] Monticello Grazing District.

Q. Just what is that Advisory Board? Explain to the Court what it is.

A. It is a group of men that are elected by the livestock permittees within the grazing district, by popular vote. Then they are appointed by the Secretary of the Interior

to advise on all matters pertaining to the administration of the grazing district.

Q. Is that the Board that Fred W. Keller is a member of?

A. Yes, sir.

Q. You say you advised with that Board respecting the elimination of these horses?

A. Yes, sir.

Q. With whom did you advise, do you recall specifically?

A. There were four members at the meeting.

Q. Do you remember who they were?

A. Fred Keller, Mr. Summers, Alma Redd and Joe Nielsen.

Q. Do you remember the date of that meeting?

A. Yes.

Q. What was it?

A. October 9, 1952.

Q. That was after you had commenced this program, was it, Mr. Kinnaman?

A. Yes.

Q. What if anything was done at that meeting of the Advisory Board?

A. They approved of this program and wanted it carried forward.

Q. State whether or not the horses taken as reflected in Exhibit B in this case were taken by you or your subordinates as employees of the United States Government under that program approved by the Advisory Board and the Resolution of the San Juan County Commissioners.

A. Yes, they were.

Q. You say the horses were sold, many of them, those that were not redeemed and were not killed were sold to Kuhni Brothers?

A. Yes.

Q. Were any of them sold elsewhere, if you know?

A. Yes, there were a few.

Q. Do you know how much was received for those horses?

A. At Kuhni's?

Q. Yes.

A. Yes, I do.

Q. How much?

A. There was some of them sold for two and three-quarter cents per pound, some three cents.

Q. Delivered where?

A. At Springville, or Provo—just out of Provo a little ways.

[fol. 104] Q. Is that the Kuhni plant you mean?

A. Yes.

Q. At Kuhni's place of business?

A. Yes.

Q. Who received that money?

A. The Monticello Grazing District Advisory Board.

Q. Is that known also as Utah Grazing District No. 6?

A. Yes, sir.

Q. Advisory Board?

A. Yes, sir.

Q. Are you acquainted with horses and the value thereof, Mr. Kinnaman?

A. Yes, I am.

Q. How long have you had to do with horses—had any experience with horses and the value thereof?

A. Oh, practically all my life.

Q. I direct your attention to the horses which you saw that were picked up, as reflected in this exhibit. Do you have an opinion as to the market value of those horses?

A. I do, generally.

Q. What is it?

Mr. Oman: I don't believe he has laid sufficient foundation to show whether he has ever done any of that or not. Further, Your Honor, that was not gone into on my examination.

By Mr. Thomas.

Q. Have you bought and sold horses?

A. Yes, for myself.

Q. Over what period of time?

A. Oh, off and on ever since I was a kid.

Q. How old are you now?

A. Forty-three.

Q. Since you were how old—sixteen or eighteen?

A. Sixteen—about sixteen.

Q. Where have you had experience with respect to the buying and selling of horses?

Mr. Oman: That is, limited to the period of time concerned here?

The Court: No, he is qualifying him.

A. I ran some horses in Wyoming.

The Court: When?

The Witness: From about 1925 up to 1934 or 1935.

By Mr. Thomas:

Q. A period of nine years?

A. Yes, or ten.

[fol. 105] Q. Is the value of horses now greater or less than at that time?

A. I believe they are less now.

Q. Do you have an opinion, Mr. Kinnaman, as to the market value of these horses which you observed, as reflected in the exhibit?

The Court: Just a minute.

Mr. Oman: I don't believe he knows what the market value is. I object to the form of the question.

The Court: The trouble is, you have not got into this record how many of those horses he saw. My recollection of his testimony on that is, he saw a few of them, he did not see the greater part of them.

By Mr. Thomas:

Q. How many did you see?

A. I saw I think one or two loads.

Q. How many in a load?

A. Probably fifteen or twenty.

The Court: All told?

The Witness: Yes.

By Mr. Thomas:

Q. I direct your attention to that fifteen or twenty—would you say twenty, or fifteen?

A. Fifteen.

Q. I direct your attention to that fifteen. Do you have an opinion as to the market value of those fifteen?

A. Yes.

Q. In 1952?
A. Yes.
Q. What was that market value?
A. I would say——

The Court: Just a minute. I don't believe you have qualified the witness. You may try to do it if you want to.

By Mr. Thomas:

Q. Mr. Kinnaman, can you indicate when you saw these horses, what time in 1952?

The Court: When is the last time you bought a horse?
The Witness: 1947, I believe.
The Court: When is the last time you sold a horse?
The Witness: I haven't sold a horse since 1934.
The Court: Haven't been engaged in buying and selling horses since 1934?
[fol. 106] The Witness: No, sir, I haven't.
The Court: This man is not qualified.

By Mr. Thomas:

Q. Have you seen any horses purchased—have you purchased any horses for anyone else other than yourself?
A. No, I haven't.
Q. Would you describe, please, to the court, Mr. Kinnaman, that fifteen horses that you saw as are included in this exhibit?

Mr. Oman: I don't believe it is material.
Mr. Thomas: I submit there are many types of horses——
The Court: I am not qualified to testify as to the value of these horses, so if he describes them to me that is not going to be helpful. If you claim anything for it, you may pursue it. I do not see how it will be helpful. You are going to have to put on proper testimony about that.

By Mr. Thomas:

Q. Can you describe them?
A. Yes.
Q. All right, do so, Mr. Kinnaman.
A. They were small—very small horses, and appeared to be of not very good breeding.

Q. State whether or not in your opinion they were good saddle stock.

A. No, sir.

The Court: He has not shown that he knows what good saddle stock is. The answer will be stricken. Qualify him on it.

By Mr. Thomas:

Q. Do you possess any saddle stock at the present time?
A. Yes, I do.
Q. Do you ride horses?
A. Yes, I do.
Q. Do you do so in your business—in your occupation?
A. Yes, I do.
Q. To whom do these horses belong?
A. Belong to me.
Q. When did you buy them?
A. In 1947.
Q. How many do you have?
A. I just have one; I just bought one.
Q. You have only one now?
A. Yes.
Q. Have you observed saddle stock from time to time over a period of time?
A. I have.
Q. Over what period of time.
A. Oh, for the last twenty years.

[fol. 107] The Court: Instead of monkeying around about it, why don't you put on some testimony here about the value of these horses? This is a round-about attempt to establish their value. You are not getting anywhere with that. In the interest of saving time, put a witness on at the proper time, on the value of these horses.

Mr. Thomas: I felt he was qualified——

The Court: Of course he is not. You have established that already.

By Mr. Thomas:

Q. I direct your attention to defendant's proposed Exhibit D, Mr. Kinnaman, which appears to be the affidavit

of publication of this notice in the San Juan Record. Did you procure that to be published in the San Juan Record?

A. Yes.

Q. Did you have it published?

A. Yes.

Mr. Thomas: You have seen this, I believe, Mr. Oman. We offer it in evidence, if Your Honor please. It is the certificate of the publication.

(Defendant's Exhibit D was thereupon marked by the reporter for identification.)

Mr. Oman: No objection.

The Court: Received.

Mr. Thomas: I thought I had a counsellor here, if Your Honor please—Mr. Aho.

The Court: We are not going to wait for him.

By Mr. Thomas:

Q. Now, Mr. Kinnaman, you have testified, I think, to the usual procedure followed in respect to the eliminating of abandoned horses. Could you tell the Court what the usual procedure is with respect to abandoned horses in this particular area?

A. The usual procedure is just what we did, exactly.

Q. This procedure under the abandoned horse program, you testified is not unusual?

A. No, sir.

By the Court:

Q. Isn't it unusual to go out and disregard the ownership of horses, drive them off, destroy them, without attempting to talk to the owners about it and give them an opportunity [fol. 108] to save their livestock, to do something about it? Do you mean it is usual procedure for you fellows to go down there and drive off horses and kill them without contacting the owners?

A. Those men——

The Court: Just answer that question. You can answer another one if your counsel wants you to.

Q. Is that usual procedure?

A. I don't quite understand you, Judge.

Q. Don't you give folks an opportunity to redeem their horses?

A. Yes.

Q. Don't you tell the owners that you have driven them off or are driving them off?

A. Yes, sir.

Q. Did you in this case?

A. We did wherever it was evident we knew who the owner was.

Q. You folks knew these Indians—you didn't know what particular Indian owned what particular horse, but you fellows knew very well that this Indian band down there in San Juan County, about which there has been a lot of controversy, claimed these horses? You don't mean to tell the Court here under oath, with a penalty of perjury hanging over you, that you didn't know that?

A. I didn't know whose these horses were.

By Mr. Thomas:

Q. You mean who the owners of the horses were?

A. No, I didn't.

By the Court:

Q. You have been dodging that all morning. That is not what I asked you. I asked you, did you know that this band of horses belonged to a band of Indians down there?

A. There were horses scattered all over the range down there. I didn't know whose those horses were.

Q. Wasn't it your purpose to drive the Indians' livestock off the range——

A. No, sir.

Q. That is what you did. You mean you didn't intend to do what you did?

A. We intended to eliminate the abandoned horses.

Q. And in your interpretation of the matter you regarded all of these Indian horses as abandoned horses?

A. All of the horses that no ownership could be determined were abandoned horses.

Q. You can determine ownership of horses by going to the people in the vicinity and asking them if they claim [fol. 109] those horses, can't you?

A. You mean if you don't know who they belong to?

Q. You can find out by asking these Indians, can't you, where they are using the horses, about the horses that are in their vicinity, find out who owned them, can't you, by going around and asking the people who are in the vicinity of the livestock you want to find out about the ownership of. You can do that, can't you?

A. You might be able to.

Q. As a matter of fact, couldn't you in this case?

A. That I don't know.

Q. You didn't try?

A. I think we did in a few cases.

Q. Did you in the cases that are involved here?

A. No, sir.

Q. You didn't care, did you?

A. We cared as much about that as we did about any of the rest of the abandoned horses.

The Court: I want to pursue this with you. We are going to pursue it if it takes a week, with all these fellows here. You fellows have considered that you have had a problem with these Indians down there, haven't you?

The Witness: Yes, we have.

By the Court:

Q. What is the problem you have considered you have down there?

A. The problem was with respect to horses or livestock——

Q. You tell me what the problem was with these Indians down there. I want you to tell me what was the problem you had.

A. They come across from the reservation and graze and trespass.

Q. What problem is there about that that concerns you?

A. That consumes the forage that we have allotted and allocated to the permittees within that area.

Q. What is it they had that grazed the forage down there?

A. These permittees have cattle——

Q. I am not talking about the permittees. Let's stick to this problem now that you say you had down there. What

animals did the Indians bring across there that you say used that forage?

A. Sheep and goats, horses.

Q. Burros?

A. Burros.

Q. How long have you had that problem?

[fol. 110] A. It has been there ever since I have been there and some time prior to that time.

Q. Tell us when.

A. As I recall, ever since the country was settled.

Q. You say when you went there; when was that?

A. In 1946.

Q. Now, tell us all the trouble you have been having about that, tell us how serious this problem has been; tell us all about that.

A. To begin with, these seven Indian families had licenses to graze there certain numbers during the winter time——

Q. Who are those seven Indian families? Are those the ones you mentioned?

A. Those were the ones I named, with the exception I left out Jim Hoppe.

Q. They had permits, did they?

A. Yes, they had licenses.

Q. Licenses from the Bureau of Land Management?

A. Yes, sir.

Q. Go ahead. Tell me all about this. I want the whole picture of this whole situation.

A. They had licenses, that was for the winter time.

Q. When was that? Did you have such licenses for the whole period involved here, from 1946 up to date?

A. Up to 1947.

Q. Go ahead, tell me the whole thing.

A. And then in the summer time they had licenses on the Navajo Indian Reservation. On May 16 they were supposed to go back on the reservation and stay there during the summer, and come back again in the fall. That, they did not do. They stayed there all the time.

Q. When was that?

A. That was when I first came there, and they had been doing it for some time prior to that time.

Q. Tell me the whole story. I want you to tell me the whole story. Open it right up, as to what is the problem,

how long you have had it, what happened, what was done about it. I want you to tell me the whole works.

A. In 1947 we had a series of meetings there and told the Indians they were to go back on the reservation and conform to the use of the range that had been written up for them, and conform to the numbers, and we wanted them to do that.

[fol. 111] We had nothing against them whatever. But we did want them to comply with those rules and regulations. They could go home in the summer time, they could come back in the fall. That if they didn't comply with those rules and regulations on the use of the range we would discontinue the issue of their licenses.

Q. Tell me about the problem you had. Relate it in detail, what this problem was.

A. Subsequent to that, in 1947, these Indians did not go back on the reservation, and we served them with trespass notices, which they paid no heed to. To make a long story short——

The Court: Don't make it short. I want it long. Give me the detail, the whole thing.

The Witness: They were served with notices intermittently, and told about the time the thing got into the federal court, or before——

The Court: Did you have any meetings with the livestock men about it?

The Witness: Yes, I guess there were some meetings.

The Court: I want to hear all about those meetings.

The Witness: I didn't attend all those meetings.

The Court: Let's hear about them. Let's hear about the ones you did attend.

The Witness: I only recall of attending one.

The Court: When was that?

The Witness: That was in—I don't remember the date—1951, I guess.

The Court: You say there were some meetings with livestock men. How many meetings were there?

The Witness: I don't know.

The Court: Do you know there were a number of them?

The Witness: I assume there were. I wasn't notified of all of them, no.

The Court: You knew about some of them, didn't you?
[fol. 112] The Witness: Yes, sir.
The Court: How many did you know about?
The Witness: Oh, they had two or three of them.
The Court: When was that?
The Witness: I don't know.
The Court: Well, approximately when was it?
The Witness: Oh, I would say in 1951.
The Court: 1951?
The Witness: Yes.
The Court: The feeling was running pretty — down there about this matter, wasn't it?
The Witness: I can't say as to that, no.
The Court: Did you run across any of that anywhere?
The Witness: No, sir, I cant say there was any ill feeling at all.
The Court: Was there any trouble of any kind?
The Witness: Yes, there was some trouble.
The Court: All right, let's hear about that.
The Witness: Well, some of the Indians got on the patented ground of these livestock men, also on the state lands of the stockmen, and they proceeded to have them impounded.
The Court: Go ahead. Tell me about it.
The Witness: That's all there is to it, Your Honor.
The Court: Was that the only trouble there was about it?
The Witness: Well, there was a practice with the sheriff and some of his deputies in the impoundment—I wasn't there when that happened.
The Court: Was there any other trouble about it?
The Witness: Not that I can recall.
[fol. 113] The Court: I want you to tell me whether or not, prior to this program of eliminating the Indians' horses and burros, you had any conference with the livestock men about that.
The Witness: Prior to that time?
The Court: Yes. To start with—I am going to ask you about all times before I am through—but we will start with prior.
The Witness: Conferences with the stockmen? No.
The Court: Who did you have conferences with?

The Witness: We have our annual or semi-annual board meeting.

The Court: What board is that?

The Witness: State District Advisory Board. That is the only meetings we had.

The Court: What was done about that? How many did you hold about this time?

The Witness: We held them every year—fall and spring.

The Court: What happened at those meetings about this?

The Witness: In 1947, adopted a resolution to eliminate the abandoned horses on the federal range.

The Court: Was that done with a view of getting rid of these Indian horses?

The Witness: That was done with a view of eliminating all abandoned horses.

The Court: The problem you had down there. Did you have any problem with any other abandoned horses?

The Witness: Yes, sir.

The Court: What?

The Witness: We had abandoned horses everywhere.

The Court: What problem did you have in 1947 with any other abandoned horses except the Indians'? I want to [fol. 114] know how many you cleaned out that weren't Indian horses, who owned them, what trouble you had, what your problem was. I am trying to find out what is the problem down there.

The Witness: 1947 we had abandoned horses throughout the district, all through the area being argued here.

The Court: About how many?

The Witness: That I couldn't tell you.

The Court: What was you- principal problem in relation to abandoned horses?

The Witness: The principal problem was just to eliminate the abandoned horses throughout the district.

The Court: I don't think you are being frank with the Court. I am going to pursue this until we find out about it. You say you had a problem because the Indians came over and used up the forage. That was your problem. Did you have any other problems down there with respect to the horses?

The Witness: With respect to the horses?

The Court: What is your big problem down there?

The Witness: There are problems other than just abandoned horses, always.

The Court: I am talking about forage now, cleaning off the horses.

The Witness: Any time you have trespass stock on the range that are consuming the forage that has been allocated for the permittees, they are going to suffer when they come back to utilize that feed.

The Court: That is right, sure. That was what was concerning you, wasn't it?

The Witness: Yes, sir.

The Court: The major factor in this problem was these Indians trespassing on that, you claim; is that right?

The Witness: Not necessarily Indians.

The Court: Was that part of the problem?

[fol. 115] The Witness: That was part of it; horses all over.

The Court: Was it an important part of the problem?

The Witness: Very important.

The Court: Very important part of the problem. Now we are beginning to get it. As a matter of fact, was there any more important part of the problem than the Indian horses and burros?

The Witness: The control of trespass stock, to keep it from utilizing the forage that has been set aside for the livestock men's licenses in that area is very important, yes, sir.

The Court: Very important. The most important part of that problem for you folks in this area was the Indian trespass, wasn't it?

The Witness: That is no more important than any other trespass.

The Court: Depends on how many stock they have out there. Did anybody else trespass more stock than the Indians did?

The Witness: I cannot say as to that. Those horses were scattered throughout the district.

The Court: Since 1946, when you came, you have had a problem with these Indians. Is that right?

The Witness: Yes; and prior to that time.

The Court: And subsequent to 1946, every year you have had the same problem, haven't you?

The Witness: Yes, sir.

The Court: Had it in 1947?

The Witness: Yes, sir.

The Court: What did you do about it in 1947?

The Witness: We served, as I stated before, we served the trespass notices on these Indians that were there at the time when they should not be there.

[fol. 116] The Court: Then what did you do? What else did you do?

The Witness: We placed into effect the abandoned horse program in 1947. We advertised it. It was not activated.

The Court: What did you do in 1948?

The Witness: We didn't activate any abandoned horse program in 1948 or 1949.

The Court: Did you do anything about it at all?

The Witness: No, sir.

The Court: Did you have a problem in those years?

The Witness: They came and got the horses subsequent to the notices that were typed up and put in the paper. Then a few months later some of them would be back.

The Court: That was true in 1948?

The Witness: We didn't put any notices in the paper in 1948 or 1949. In 1950 I asked if the county commissioners would reactivate the abandoned horse program, which they did. But that was never activated——

The Court: Go ahead. Tell me all there is about it.

The Witness: In 1951 up until 1952, when they placed into effect this present program.

The Court: When was it you did activate?

The Witness: We started in September of 1952.

The Court: Was that the first time it had been activated in your time, between 1946 and 1952?

The Witness: Yes, sir.

The Court: What led to getting it activated in 1952?

The Witness: It was the condition that had been going along for some time.

The Court: Tell us about that condition.

The Witness: The drouth and trespass stock had placed that range in such a serious condition that something had to be done about it.

[fol. 117] The Court: Go ahead. Develop that.

The Witness: One of the things that we did was to move these abandoned horses from the range.

The Court: What else did you do?

The Witness: That is all.

The Court: You said "one of the things"—eliminate the abandoned horses. What else did you do?

The Witness: Well, that is about all, except we asked all of the livestock men to take just as much non-use as they possibly could.

The Court: What do you mean by that?

The Witness: Come on the range with as little livestock as they possibly could in order to get by, and save the grassroots that were left on this range.

The Court: What else did you do?

The Witness: That is about all you can do.

The Court: Did you discuss this matter with the livestock men prior to your activating this program in 1952?

The Witness: Some of them, yes.

The Court: Who did you discuss it with?

The Witness: I can't remember; numerous individuals.

The Court: Let's hear who they are.

The Witness: I believe John Rogers was one, and several of the Board members—Advisory Board members, were the main ones.

The Court: Let's hear who they are. Will you list all of the livestock men with whom you discussed this activating program business?

The Witness: All the Advisory Board members, which consists of K. S. Summers, E. J. Redd, Joseph Nielsen, Fred Keller, Lloyd Adams.

The Court: Now, who else besides your Advisory Board members?

[fol. 118] The Witness: John Rogers is the only one I can specifically remember.

The Court: What was the discussion with those livestock men?

The Witness: It was obvious that something would have to be done to eliminate these abandoned horses that were running at large on the open federal range.

The Court: Did you discuss the Indians?

The Witness: No, sir. We discussed the abandoned horses.

The Court: You haven't talked with anybody about the Indians in relation to this problem?

The Witness: No, sir.

The Court: I want to be clear about that, now. In all of your activity with this situation which you have described to me as so serious a problem, you never discussed with anybody the Indians' connection with the problem?

The Witness: Not specifically, no, sir.

The Court: Have you at all?

The Witness: That I can't recall.

The Court: You have not connected the Indians with this problem, then?

The Witness: Yes, we assumed some of these horses were Indian horses, yes.

The Court: And did you discuss that with the Advisory Board of livestock men?

The Witness: Generally we would have to, yes.

The Court: Then you did discuss the Indians' connection with this problem?

The Witness: Along with everybody else that might have anybody that might be concerned.

The Court: With whom did you discuss the Indians' connection with this problem, and when?

[fol. 119] The Witness: With the Advisory Board.

The Court: When?

The Witness: At numerous times.

The Court: What did you say about it?

The Witness: The matter was just reviewed in all of its history.

The Court: Tell me what you said and what they said. Let's have the conversation.

The Witness: All I can say is this, that the Indian livestock were down there. As far as this agency was concerned, they done the best they could in order to alleviate the problem.

The Court: I don't understand who it was did the best they could.

The Witness: This Bureau.

The Court: Tell me more about that. I am going to ask everybody in this connection the same questions. I am going now to exclude from the court room all of the Bureau of Land Management witnesses of the Advisory Board who

had anything to do with these conversations. Leave the court room, all of them.

The Witness: Did you mean me?

The Court: No, I don't mean you. I am going to ask you a few questions.

Mr. Thomas: Does that mean the witnesses the government has subpoenaed?

The Court: Yes, I mean government witnesses.

Mr. Thomas: We subpoenaed others than on the Advisory Board.

The Court: Anybody that has anything to do with this man's testimony, I want to exclude them from the room. Exclude all your government witnesses. We will interview them one at a time.

Mr. Thomas: Do you mean to include the Land Management employees?

[fol. 120] The Court: All the government witnesses.

Mr. Thomas: Mr. Aho is one.

The Court: Oh, no, he is not a witness.

What I want you to do is this—you have now testified with a great deal of reluctance that you did have some conversations in dealing with this problem in which the Indians' share in the problem was mentioned. I want you to give me those conversations.

The Witness: In practically all of the Advisory Board meetings that we have had since I have been there, that was the primary issue. At the time I first came there, and has been adamant ever since, been brought to our attention, to get something done about the trespassing stock. That was one of the first things that was brought to my attention when I came down there.

The Court: Were you talking about the trespass of stock of the Indians among others?

The Witness: That was sheep and horses and goats.

The Court: Of the Indians?

The Witness: Yes, of the Indians.

The Court: Tell me with whom you discussed that.

The Witness: I discussed it with all of the Advisory Board members. It was brought to my attention by the Board.

The Court: When was it first brought to your attention by the Board?

The Witness: When I first came there, in 1946. I attended a meeting prior to that, but another man was in charge of the district, in the fall of 1945, and it has been a matter that has been discussed, you might say, ever since, since when I first came there, and a long time before that.

The Court: You discussed it with the Advisory Board members when you first came there in 1946. Now, when next did you discuss, and with whom?

The Witness: I think the minutes will show entries made almost every year since the district was made, in 1935.

[fol. 121] The Court: You are still talking about the problem of the forage, of the Indians trespassing, among other trespassers?

The Witness: Yes, sir.

The Court: What is the biggest problem of trespass you have down there?

The Witness: Trespassing stock is always something——

The Court: I understand. But whose trespassing stock, if you know?

The Witness: The biggest problem we had is when the Indians moved across the river in 1950, I believe it was.

The Court: Was that about the time the lawsuit was started in this court?

The Witness: That was after.

The Court: That was after?

The Witness: Yes, sir.

The Court: But you had the same kind of problem before that, that led up to the lawsuit, I suppose?

The Witness: Not to that extent, no. When it went to a lawsuit, a great deal more Indians came over.

The Court: And they brought their livestock with them?

The Witness: Yes, sir.

The Court: That has confronted you folks with quite a problem?

The Witness: Yes, sir.

The Court: And it was to solve that problem that you were eliminating these animals in the present lawsuit, wasn't it?

The Witness: No, sir.

The Court: I am having a great deal of trouble to have you say that was a major problem down there. You say the Indian's portion of it was considerably the most important

part of the problem, yet you say eliminating their animals was not done with any view to solving the problem.

[fol. 122] The Witness: The worst of it was when several thousand sheep came over from the reservation.

The Court: Tell us about that.

The Witness: 1950, the fall of 1950, is when the program started. All of these sheep came across the river on the range, on the allotments of these livestock men.

The Court: What did you do about that?

The Witness: We served them all with trespass notices.

The Court: What happened?

The Witness: Some of them went back, some didn't. The biggest end of them stayed there.

The Court: How long did they stay?

The Witness: They stayed there until along in June, May or June of 1952.

The Court: We are going to recess for lunch. We will resume at two o'clock.

The order is that the government witnesses do not discuss with each other or with anybody their evidence in this case.

Mr. Thomas: Not with me?

The Court: Not with anybody.

The Court: Now, Mr. Thomas, you, of course, talk to the witnesses if you want to. I don't want you to talk to them all—at least, talk to one at a time. And I want the witnesses excluded here during the examination.

Now, Mr. Oman, the Court has been indicating to you the line of inquiry I would like to have you pursue. So you go ahead and pursue it.

Mr. Oman: Is Mr. Thomas through?

Mr. Thomas: Yes. No further examination.

Redirect examination.

By Mr. Oman:

Q. Now, Dale, you say you posted notices on the 19th of September?

A. Yes, sir.

Q. That was all up east of Monticello?

A. Yes, sir.

[fol. 123] Mr. Thomas: 19th of September?

The Witness: No—July.

By Mr. Oman:

Q. You want to change that to the 19th of July?

Mr. Thomas: His testimony was, the 19th of July.

By Mr. Oman:

Q. You posted on the 19th of July, is that correct?

A. Yes, sir.

Q. You posted just east of Monticello, towards the Monticello line, is that correct?

A. Yes, sir.

Q. That road leads out to the north of the area in dispute here, doesn't it?

A. Yes, sir.

Q. As far as you know of your own personal knowledge, that is the only notices that were posted?

A. No, sir.

Q. Did you post others?

A. Dee Black posted other notices.

Q. You don't know that he posted them, do you?

A. Yes.

Q. Did you see where he posted them?

A. I saw some of them, yes, sir.

Q. When did you see them?

A. I saw them right after they were posted.

Q. When was that?

A. A few days after they were posted. I couldn't say particularly on the date.

Q. Where?

A. Right in Monticello—three right in Monticello.

Q. He posted those?

A. Yes, sir.

Q. Those are the only ones you saw?

A. Yes, sir, that is right.

Q. Now, Dale, you had continuous difficulty with the Indians' livestock down in this area, you say, ever since you came here?

A. Yes, sir.

Q. That same difficulty was had, you said, prior to the time you came here?

A. Yes, sir.

Q. It is so far back that it even existed prior to the time the Taylor Act was inaugurated, did it?

A. I believe so.

Q. You had any meetings with livestock men and with your Advisoy Board as to what to do about this problem that the Indians presented to you down there?

A. Yes, we did.

[fol. 124] Ever since you came there in 1946?

A. Yes, sir.

Q. And you were continually endeavoring, in one method or another, to rid this range of this trespassing livestock, as you call them?

A. Yes, sir.

Q. Now, Dale, you know where Sakezzie lives?

A. Yes, sir.

Q. He had permanent buildings there?

A. Yes, sir.

Q. A rock hogan and corral?

A. Yes.

Q. He had some fields there, didn't he?

A. I couldn't say for sure whether he has a field there.

Q. You have been to the hogan?

A. Yes, sir.

Q. You haven't observed the field?

A. He had a garden there.

Q. How big a garden is that?

A. I don't know how big it is.

Q. Twenty acres?

A. Might have been four or five acres.

Q. He has a reservoir there, hasn't he?

A. Below his house he had one, yes.

Q. Does he have any above the house?

A. There is a reservoir up there, yes, above his house. But I don't believe he built that one.

Q. You don't know who did?

A. The C.C.C., I believe, built that reservoir.

Q While you were there?

A. No.

Q. What prompts you to say they built it? How do you know that?

A. There is a project in our files that covers that reservoir.

Q. You don't know for whom it was built?

A. No, I don't know for whom it was built.

Q. Does your project show it was a completed project?

A. Completed project, yes.

Q. In these Board meetings—in these meetings with stockmen, what stockmen did you meet with other than the Advisory Board members?

A. There were several that were in this one meeting I referred to held in Blanding, of all the stockmen in that end of the country.

Q. You mean all the permittees who were granted permits in the areas which were involved?

A. Yes.

Q. Can you name who they were?

A. There are several.

[fol. 125] Q. Name them.

A. Bill Young, Leland Redd, John Rogers, Clarence Rogers; every one of them that ran livestock in that country. Joe Redd, Delbert Redd, Joe Nielson, Grant Baliss.

Q. In your discussion with them at this meeting you attended—when was that meeting held?

A. It was in 1951, I believe.

Q. In 1951?

A. Yes.

Q. That was right after you had been up here and had the United States Attorney file an action to restrain these Indians from using this area any further?

A. Yes, some time afterwards.

Q. What did you discuss at that meeting?

A. All they did, they asked me to come down to the meeting. Leland Redd was the president of the Livestock Association. They reviewed to the rest of the stockmen there what they had done up to date with respect to the trespassing livestock, and reported on their trip to Washington.

Q. Reported on their trip to Washington relative to this case which you had brought here in this court?

A. Yes, sir.

Q. Did you propose to them at that time what further steps should be taken?

A. I did not.

Q. Did they propose what further steps should be taken, to you?

A. No, sir, they did not. They asked me if I had anything to say on the matter. I said no, that I didn't

Q. Dale, who furnished the information to the office up here that the problem was out of the way now, that they might go ahead and have this action dismissed which you had brought in this court to enjoin the Indians?

A. They asked us for a report as to whether or not any of this livestock were still on the federal range, and we sent Black down on the range. Dee Black said none of the stock were there. I furnished this office with that information.

Q You examined that range and found they had eliminated all the horses, and reported it up here to this office?

A. This was with respect to the sheep, Milt.

Q. You were suing, in the lawsuit, for trespassing horses as well as sheep, weren't you?

A. I don't recall whether it was sheep or horses or not.

Q. You told them the livestock were all out of there, didn't you?

A. I told them there were no bands of sheep in there.

[fol. 126] Q. Do you have that report with you?

A. I think it is here, yes.

Q. Could you have someone find it? Could Mr. Aho find it? I would like to see the report that you submitted to the office here.

A. I think he can find it.

Mr. Oman: May we have that letter?

The Court: Yes, the government will produce that report.

By Mr. Oman:

Q. Did you have a reply back to that report?

A. I don't recall that I had any reply on that.

Q. You have stated you found, the day you were down on the range helping gather the livestock, some horses belonging to Butt and someone else?

A. Yes.

Q. You immediately turned those horses over to Willard Butt?

A. Yes, sir.

Q. Where did you turn them over to him?

A. At his place in Bluff.

Q. You hauled the horses to him and delivered them to him?

A. Wasn't necessary to haul them.

Q. Did you lead them?

A. Dee and Bob just put them in his pasture there.

Q. How did you get them from where you picked them up to the pasture?

A. They drove them.

Q. How much did you charge them for returning the horses to Bill?

Mr. Thomas: Object to this as immaterial.

The Court: What do you claim for it?

Mr. Oman: I am going to show what he char d this Indian.

The Court: Go ahead.

By Mr. Oman:

Q. What did you charge them?

A. $2.50 a day gathering charge on them.

Q. How many days?

A. $2.50 a day gathering charge plus the expense for the time we were holding the horses.

Q. What was the total amount charged?

A. Four head—I believe he had four head—I think it was $10.

Q. $2.50 a head you charged him?

A. Yes, I think that is right. I am not sure.

[fol. 127] Q. If it is not, you can refer to your records while here. You have them here, don't you?

A. Yes.

Mr. Oman: If there is any correction in that we will be glad to have it.

Q. There was another white man that had some horses in that bunch, was there not?

A. Olin Oliver.

Q. You did the same with his horses, delivered them to his pasture or his corral?

A. I believe so.

Q. What did you charge him per head, the total price?

A. I don't know, Milt.

Q. You don't know?

A. No. I was out of the office at the time. Olin's brother I believe settled up with Dee on that. Olin was in Salt Lake.

Q. You never delivered any of these Indian horses back to their corral or pasture, did you?

A. No sir.

Q. Didn't intend to, did you? Had no intention of ever returning these horses to these Indians again?

A. We returned several horses to the Ute Indians that came and claimed them.

Q. Not to these Navajos, you didn't intend to return any of these horses?

A. If they claimed them, we would have done the same thing with them as we done with the others.

Q. Why didn't you?

A. We didn't know whose horses they were.

Q. You knew generally that all of these plaintiffs, the little band to which they belonged owned all of these horses except such as you found were white men's horses—isn't that so?

A. No sir.

Q. You don't know where Sakezzie lives?

A. Yes, but I am not acquainted with his horses.

Q. You know where you took his horses from?

A. No sir.

Q. You don't remember the date they had to keep the horses in the corral and were shipping them to Kuhni's—Dee Black—you remember that date, don't you?

A. No, I don't.

Q. You did nothing to send your truck back with Sakezzie's horses, did you?

A. I don't remember the date anything was said about his horses.

Q. What other meetings did you hold with these stockmen concerning this problem with these Indians?

[fol. 128] You have mentioned one you held in Blanding in 1951. What other meetings did you have?

A. I instigated no meetings.

Q. I didn't say instigated. I said what meetings were held.

Mr. Thomas: I object to it as being immaterial.

The Court: Overruled.

A. There is only one other meeting I recall. I don't know what the purpose of it was or anything. There was a group of stockmen wanted to hold a meeting in my office there. I don't remember what date it was. I believe it was along about the same time that this other meeting was held.

Q. About the same time. For what purpose was it held?

A. It was relative to some school sections, the way I recall, that the stockmen had leased.

Q. Down in that area?

A. Yes.

Q. They had reported to you that these Indians were using the school sections they had leased, as well as using the federal range?

A. Yes.

Q. They wanted you to do something about it, to cooperate with them, didn't they?

A. I guess they did. I don't recall the details of it.

Q. You say you don't recall them?

A. I am doing the best I can to answer your questions, Milt.

Q. What action did you decide to take, then—what further action—to rid this range of this Indian livestock?

A. At the time they held this meeting?

Q. Yes.

A. There was no decision.

Q. When did you make a decision? You finally decided to get rid of the horses?

A. There was no decision of any kind made until we decided to place this abandoned horse program into effect.

Q. You knew these Indians had to have these horses down in that area in order to live, didn't you?

A. These Indians, yes; they all have horses.

Q. You know in that remote, rough country, they had to have these horses in order even to exist, didn't you?

A. I can't say that, Milt, no sir.

Q. You know that they are livestock men, that is all they are, don't you?

[fol. 129] A. I don't know that for sure, no sir. There are several of the Indians that have jobs around over the country. They drive pick-ups.

Q. These plaintiffs?

A. Yes.

Q. Which one has a job around the country?

A. You see them going all over the country in trucks.

Q. Is that the way you conclude they own the truck?

A. That is an assumption I always make.

Q. Did you ever see them driving a truck, any of these plaintiffs?

A. I believe so, yes.

Q. Who?

A. Sakezzie has a truck.

Q. Ever see him driving a truck?

A. No.

Q. Never saw any of the plaintiffs ever drive a truck, did you?

A. You see the Navajos driving trucks.

Q. You conclude they have other jobs from that than making a living on this range—is that the way you arrive at that conclusion?

A. I do know several of the Navajos work in various places.

Q. When you held this meeting you considered and planned what would be the most effective thing for you to do to eliminate these Indians from this range, and you concluded the thing to do was to destroy the thing most necessary to their lives and most dear to their hearts, that you would kill those animals so there would be no possibility of them being returned to this range, and in that way you would solve this problem of moving the Indian himself out of this area—isn't that true?

A. No sir, that is not true.

Q. Then what is true?

A. I didn't conclude that.

Q. Why did you arrive at the removal of the horses, then? What led you to conclude to kill them?

A. For eliminating the abandoned horses, the same as we

had done in many other areas, as a nuisance to the public range.

Q. Had you concluded that these horses were abandoned?

A. That would prove itself, when horses were gathered.

Q. Had you concluded that?

A. These horses were all over the range.

Q. Sure; they were right where you knew they had been all these years since you were there, weren't they—always right there in the same place?

A. At different times, yes; but not in the numbers they had been.

Q. Had the numbers increased since you came there?

A. Yes.

[fol. 130] Q. Had you counted the horses any time prior to the destruction of them?

A. No.

Q. Then you don't know whether they had increased or had not, do you?

A. It was obvious there was more horses; didn't have to count them to see that.

Q. How else would you know that?

The Court: Do you mean the Indians had more horses?

The Witness: There were a lot more horses on the range than had previously been.

By Mr. Oman:

Q. You say you eliminated horses generally. How many horses for white men were eliminated in this drive that began with the elimination of these Indian horses?

A. There were several head. I think they referred to most of them.

Q. These eleven head you talk about?

A. Yes. You have an itemized account of the horses.

Q. Over one hundred head of Indian horses?

A. That is approximately right.

Q. About thirty-five head of burros?

A. I don't believe there were that many burros.

Q. That is close to it, isn't it?

A. It would be less than that, I believe.

Q. How many would it be?

A. You might be right. I am not sure.

Q. You knew, didn't you, that nobody owned a burro except these Indians—no white men owned burros, that is true, isn't it? Down in this country you know no white man owns burros? You know every burro down there belonged to these Indians?

A. That would be a supposition.

Q. Be a safe one, wouldn't it?

A. Just be a supposition.

Q. Do you know of any white man who owned any burros. Do you have permits issued to anybody for burros?

A. Not burros specifically, no.

Q. And yet you killed those burros without making any endeavor to take them back down to find out from these Indians to whom they might belong, didn't you?

A. There wasn't any other alternative.

Q. You couldn't get them cleaned off the range to suit [fol. 131] you in any way except to kill them, isn't that true?

A. When you don't know who they belong to.

Q. You didn't make any effort to find out, at all, if you suspected they belonged to an Indian, did you?

A. That is not so.

Q. You know Ira Hatch maintains a number of posts in the center of where the Indians live and operate—you know all you had to do would have been to go to Ira Hatch's post, he is always there, and he could have immediately told you to whom the burros or horses belonged? You have many and frequent contacts with him, don't you?

A. I have contacted him, yes; but not frequently.

Q. You know he knew to whom every one of these Indians horses and burros belonged, don't you?

A. No, I didn't know that.

Q. You didn't try to find out, did you?

A. No, I didn't, personally.

Q. To whom would you go to try to find this out? Would it be Sakezzie?

A. The logical person to go to would have been the Indian Service.

Q. You wouldn't bother the Indians themselves?

The Court: Did you go to the Indian Service?

The Witness: No sir, I didn't. But I wrote them a letter about this, which was never replied to—never got to me.

By Mr. Oman:

Q. You knew these horses were not picked up on the Indian reservation, that they were picked up on land outside of it?

A. Yes.

Q. You are acquainted with other hogans owned by the plaintiffs in this range area other than Sakezzie, aren't you?

A. A few. I am generally unaware of all of those hogans that these men talk about.

Q. Wherever you go you have seen hogans?

A. Yes, I have seen some hogans, yes.

Q. Did you employ a plane in helping to locate these horses?

A. No sir, I didn't.

Q. You didn't?

A. No sir.

Q. Have you employed one at any time in flying over this range?

A. We didn't fly over that part of the range.

The Court: That is immaterial, then.

[fol. 132] By Mr. Oman:

Q. You have held, besides the two meetings you mentioned, many meetings with Leland Redd about what to do regarding this Indian livestock, haven't you?

A. Leland Redd has been in my office, not at my request, several times.

Q. You have met with him, haven't you?

A. He brought up the Indian problem, yes sir.

Q. You have discussed that with him many times, haven't you?

A. I would say several times.

Q. He has requested you to take action to eliminate this livestock?

A. He has, along with several of the other stockmen, asked for relief of the problem, yes sir.

Q. You have awarded to him the range in which Sakezzie's hogan and his fields are located, haven't you?

A. That location of Sakezzie's hogan is, I believe, right between Delbert and Leland Redd's.

Q. You gave each of them part of Sakezzie's land?

A. I believe so, yes.

Q. That was deliberately done, wasn't it, so they would have their livestock upon the little plot this old man cultivated, and help to drive him out of this area?

A. Those allotments were set up prior to my time several years.

Q. Haven't you changed them in any way?

A. No, very little.

Q. You have told the court you needed this feed for the permittees' livestock. That is the reason you persisted in forcing these Indians out of this area, is that right?

The Court: He has covered that.

By Mr. Oman:

Q. You have said these Indians had how many head of livestock in there?

A. I don't recall that I said how many.

Q. Will you say they had about 115 horses?

A. What period of time do you mean?

Q. During the period of time involved here. Confine it to that.

A. Altogether there was about 114 head, I believe, of horses.

Q. And the burros you mentioned?

A. Yes.

Q. Anything else—sheep?

A. No.

Q. Immediately prior to this there were sheep in there, were there not?

A. Yes, prior to that time there were.

[fol. 133] Q. Prior to the time you started killing their horses?

A. Yes.

Q. How many head?

A. There was about three thousand, something like that, I believe.

Q. That would be all the horses and the sheep. Any cattle?

A. There were some cattle.

Q. Did you ever count them?

A. Yes, we counted them. I don't remember how many cattle there were.

Q. Do you remember approximately how many there were?

Mr. Thomas: I object to that as being immaterial.

The Court: I think so.

By Mr. Oman:

Q. How many head of livestock did the white men operate in there?

The Court: I think that is covered.

By Mr. Oman:

Q. It was mentioned about the feeling existing down there at one time. At that time did you request Knox Patterson to contact these Indians and ask them to move out of this area until the lawsuit was concluded that had been heretofore filed by you?

A. No, sir, I did not.

Q. Did the stockmen themselves report to you that they had made such a request of him?

A. I understood——

Mr. Thomas: I object to it, if your Honor please, as being outside the realm of this case, and immaterial.

The Court: It is not outside the realm of this case. Sustained.

By Mr. Oman:

Q. You never made any direct contact with Knox?

A. No, sir.

Q. Did you ever attend any meeting where he was present in the State Capitol?

A. Yes, one I did.

Q. Did you in there hear the request made that Knox do what he could to have his clients move back until this lawsuit was concluded?

A. Yes, I believe so.

Q. Then you began your program to kill off the horses while you had their sheep moved down inside the reservation?

A. That meeting we had in the State Capitol building

was in the fall of 1950, along in November. And this [fol. 134] present program was placed into effect almost two years later.

Q. After you had requested Mr. Patterson to have them moved, did they move the livestock back?

A. I didn't request him to do that.

Q. You heard the request made——

The Court: That doesn't matter. It is immaterial.

By Mr. Oman:

Q. Do you know where Nocki's hogan is located down there?

A. I know where one of his hogans is located, yes.

Q. Do you remember having anything to do with taking his horses?

A. No, sir.

Q. You, personally, don't know about that?

A. No, sir.

Mr. Oman: That is all.

Recross-examination.

By Mr. Thomas:

Q. You refer to 114 head of horses. Do you have in mind the horses picked up as reflected in Exhibit B? Is that what you have reference to?

A. Yes, sir.

Mr. Thomas: That is all.

Mr. Oman: That is all.

The Court: Step down.

The Court: Call your next witness.

DEE BLACK testified:

Direct examination.

By Mr. Oman:

The Court: You can stay in the court room, Mr. Kinnaman.

By Mr. Oman:

Q. State your name, please.
A. Dee Black.
Q. Where do you reside, Mr. Black?
A. Blanding, Utah.
Q. How long have you resided there?
A. Since 1912.
Q. Is that the town in which you were born?
A. No.
Q. How old are you now?
A. Forty-six.

[fol. 135] Q. You are range aid employed under the supervision of Mr. Kinnaman?

A. Yes.

Q. Mr. Black, I should like to know how many of the horses and burros which you gathered belonging to the Indians in this range area with which we are concerned here, that you shot or otherwise killed on the range?

A. I believe nine.
Q. Nine horses?
A. Yes.
Q. How many burros?
A. One.

Q. One burro. How many of these did you kill in handling them in the truck?

A. Five.

Q. From what corral were these horses loaded into the trucks which carried them to the packing company?

Mr. Thomas: If your Honor please, I object to that question as being indefinite. What horses?

The Court: Is there any doubt in anybody's mind about what horses we are talking about? The objection is overruled.

By Mr. Oman:

Q. What corral did you use in loading these horses in the truck?

A. They were different corrals. We didn't load them all from the same place.

Q. Name the corrals, then—where located?

A. There is the rodeo ground in Monticello, and the P. C. corral; that is a public corral in Blanding.

Q. Where were most of the horses loaded from—which of those corrals?

A. The corral in Blanding.

Q. When the horses were loaded from the corral in Blanding into the truck, were they taken directly from that point into the packing plant in Provo?

A. Yes.

Q. There was no stopping between?

A. We stopped at Monticello to have them inspected. We didn't unload them.

Q. You inspected them right in the truck?

A. Yes.

Q. Who did that inspecting?

A. Claude Foy, brand inspector in Monticello.

Q. Did he do that in each instance?

A. Yes.

Q. Do you remember picking up the horses belonging to Little Wagon?

A. I don't know who they belonged to.

Q. You knew when Little Wagon came to you and told you, didn't you?

A. Ira Hatch came up to my place with Little Wagon [fol. 136] and said I had picked up some of Little Wagon's horses, and wanted to know where they were. I told him the horses was up in the corral at Ray Hunt's. He wanted to know if Little Wagon could get the horses back. I told him the range manager was responsible for that, have to see him.

Q. Who was that?

A. Dale Kinnaman.

Q. Did you contact Mr. Kinnaman, or report to Little Wagon what it would cost to get his horses?

A. I called Dale on the phone and asked him what it would

cost to get the horses back. He said some of those horses had been trespassing quite a while. He didn't make a definite price. I went back and told Ira that evidently the price would be quite high in redeeming them. He said the horses wasn't worth it.

Q. You told him they would be sixty dollars a head, didn't you?

A. No.

Q. What price did you tell him?

A. I told him previously on some occasions had charged them two dollars a month for trespass cases; some of those cases had probably been on the range for two years.

Q. Do you wish it to be your testimony that you did not say what amount of money he would have to pay to get them back?

A. Yes. I didn't know.

Q. When did you ride these horses?

A. About a week later, something like that—a few days; I don't remember.

Q. What date was that?

A. I couldn't tell you.

Mr. Thomas: Might I call his attention to this exhibit?

The Court: Let counsel examine the witness in his own way.

By Mr. Oman:

Q. What date was that?

A. I couldn't remember what date it was.

Q. Was it some time in June?

A. No, it was some time near the 1st of October, 1952.

Q. Do you remember taking Sakezzie's horses?

A. I took some horses in the area where I seen him camped.

Q. You moonlighted those horses to get them, didn't you?

A. We got them in the night.

Q. In a moonlight night, sat up on top of the bluff overlooking Sakezzie's corral, and watched him turn those [fol. 137] horses out to graze in the night, and picked them up within a half mile of the corral, didn't you?

A. It was more than that.

Q. How much more?

A. Out on the mesa on federal range.

Q. You watched them move from the corral out there where you picked them up?

A. I did not.

Q. You had a pick-up car there, didn't you?

A. I was on Alkali Point, fifteen or twenty miles from the area where the horses were picked up.

Q. Were you the only man driving that pick-up truck that night?

A. No.

Q. Who else was driving?

A. Bob Krumm.

Q. Did you and Bob split up, him go one place and you another?

A. No.

Q. You stayed together?

A. Yes.

Q. What time of night was it you picked the horses up?

A. About eight o'clock.

Q. You knew those horses were Sakezzie's horses, didn't you?

A. I had seen him ride one or two, but I didn't know they were his.

Q. Didn't you know they were coming out of his corral?

A. I didn't know they came out of his corral. It was dark when he turned them out. I can't identify any of those horses in the corral.

Q. Where did you take these horses when you picked them up?

A. To Blanding.

Q. Put them in the same corral you testified about?

A. Yes.

Q. In shooting these horses it was your intention, your aim to shoot these horses in the body someplace so you knew they would die eventually if they didn't die right there?

Mr. Thomas: May I object to that——

The Court: Overruled.

A. No. Would you like me to tell you how they were killed?

Mr. Oman: Answer the question.

A. The horses we killed were either hurt or unable to travel or something was wrong with them. We shot them [fol. 138] in the head and killed them, and put them away where they were taken care of.

Q. Didn't you shoot some of them in the stomach?

A. No, I think not.

Q. Ever shoot a white mule?

A. No.

Q. Do you remember picking up hobbled and belled horses?

A. I never have picked up a hobbled horse.

Q. Did Mr. Krumm pick up any?

A. Ask him.

Q. Were you with him on some of these occasions?

A. I was with him on occasions, but not when he picked up any hobbled horses.

Q. Who helped you besides Krumm in rounding up these horses?

A. There was a lot of people.

Q. Name them.

A. On the first occasion there was Croft May, Leland Redd, Tom Redd, LaVar Lyman—I don't know that I can remember all of them for sure.

Q. They are permittees in this area where these Indians ran their livestock, aren't they?

A. Some of them.

Q. Leland Redd is?

A. Yes, and Alma. They were on their allotments.

Q. The livestock were on their allotments?

A. Yes.

Q. What meetings did you attend in which you considered this plan to eliminate the Indian livestock?

A. I didn't attend any meetings considering the plan of livestock.

Q. Never attended any meeting with Mr. Kinnaman?

A. No.

Q. You just went ahead and did this on your own?

A. No.

Q. How did you come to do this work?

A. He told me to do it. I was under his orders. But we never did have any special meeting about it.

Q. Did you discuss what you had planned to do with other officers of the Bureau of Land Management?

A. No.

Q. Did Leland Redd or any of these other men help you on any occasions in gathering these horses?

A. No.

Q. How many occasions was Leland Redd with you on?

A. Three occasions.

Q. Do you know what lands these Indians own down in this area?

A. Yes, I think I do.

Q. Do you know they own some sixteen hundred acres at least?

A. No, I don't.

[fol. 139] Q. How much do they own?

A. One hundred and sixty acres.

Q. Do you know whether Ira Hatch has a lease of Indian allotments totaling eight hundred acres in Cross Canyon?

A. I have heard he did.

Q. You know that is in the federal range?

A. Yes.

Q. You know he also owns in this area some several thousand acres, don't you?

A. I don't know what he owns. I know he owns quite a bit of land.

Q. Out in this area?

A. In the Montezuma area.

Q. Did you yourself take any of these horses clear into the Kuhni Packing Company?

A. Yes, sir.

Q. How many loads?

A. I believe three; I can't remember exactly.

Q. Mr. Kinnaman directed you to go ahead and transport these horses?

A. Yes, sir.

Q. You did that in government trucks?

A. Two loads, I think.

Q. Whose truck did you use to transport those horses that were not transported in government trucks?

A. William Young's.

Q. Is he a Board member?

A. No.

Q. Had you had any other trouble with the Indians while you have been there, other than gathering their horses?

A. I never had any trouble with them, as far as I am concerned—I never had any trouble with them.

Q. Do you know of any trouble that the Bureau of Land Management had with them while you were employed there?

A. I had served a lot of trespass notices on them for sheep.

Q. What year was that?

A. From 1950.

Q. Did you follow up with those trespass notices and give them an opportunity to be heard?

A. I did.

Q. Where did you hold any hearing?

A. The federal case was heard here in 1950. I wasn't on the case.

Q. What was finally done in following up the trespass notices?

A. Most of the trespass notices was after that hearing in 1950, when they heard that case up here and it was thrown out of court. We had a big invasion of Indians coming across the reservation with their sheep because [fol. 140] from the stories they told me, the land belonged to them—their lawyer advised them the land belonged to them, and they came over to take possession of it.

Q. Then you decided the thing to do to get rid of the Indians was to kill off their horses?

A. I did not.

Q. Was it so decided, that you know about?

A. No.

Q. You did kill them off right away after that?

A. We had an abandoned horse program that had been common procedure since the early '40s, in Dry Valley. About that time we had a lot of horses that was running wild that nobody claimed.

They started the abandoned horse program to eliminate them off the range. Along in 1950, we had another group

of horses that invaded the range. They got the program ready to go. The horses disappeared. That was advertised.

Later, in 1952, there was a large number of horses came on the range, and again we advertised that we was going to have a horse roundup. The horses, the bulk of them, disappeared. The poorer horses, and the unbroken ones, the wild ones, was left on the range. I went down there and spent two months going around telling the Navajos. I went to Ira Hatch's store at numerous times—

The Court: Let's fix the time.

The Witness: In 1952, in the fall, in August and September of 1952, I went down there pretty near continuously in those months, telling the Indians and traders that there was going to be a horse roundup, and if they wanted the horses—if they belonged to them they could get them, and get them back, we wouldn't bother them, but for any horses that was left there that wasn't claimed, the law provided we could round them up, and that was the program that was going to be started. I have been to Sakezzie's camp several times and told them. I told them we was having a horse roundup.

Told Jim Hatahley. He asked me about his horses. I told him we was rounding up horses; asked him if he would get them and take them back to the reservation—I didn't want to take his horses, but any horses left on the range I would have to take them. That was my job.

Q. Jim who?

A. Jim Hatahley.

[fol. 141] Q. Mr. Black, what did they tell you when you contacted them?

A. Jim said he had some horses out there, said he would ride and try to find them, was going to get them back. Most of them did—said they would get their horses. In some cases they said the fences was down, they was having a hard time to hold them on the reservation. They were riding, some of them, constantly taking care of the horses. There was a lot of horses took back. I think I can safely say in July, 1952, there was four hundred horses in that area running the range.

Q. You didn't count them, did you?

A. No. I counted groups here and there. In certain areas we never picked up horses; they were cleaned out.

Q. You made an examination of this range and decided you had them all killed off?

A. No; I think there is still horses there.

Q. When is the last time you rode the range and examined it for horses?

A. I was down there and rode around in the pick-up about two months ago; didn't have time to ride the range horseback.

Q. You didn't see any horses?

A. Yes.

Q. You did?

A. Yes.

The Court: We will take five minutes recess.

(Recess.)

By Mr. Oman:

Q. Mr. Black, you say you contacted Sakezzie and Jim Hatahley and told them to take their horses out of this area?

A. Yes.

Q. You knew they had horses in the area?

A. I knew some of them was Indian horses. If they wanted them, I wanted to give them a chance to come and get them and take them back.

Q. They are the only two Indians you contacted?

A. No.

Q. Who else?

A. Eddie Nocki—several in this group here.

Q. Did I understand Mr. Foy inspected these horses in each case?

A. Yes.

Q. Every truckload you shipped out?

A. All but one.

Q. Which one?

[fol. 142] A. Four horses that went to the sale barn. Mr. Foy wasn't in town. An inspector of Colorado inspected those four horses.

Q. Where were they gathered?

A. They were gathered on McCracken Mesa, under the Rim there.

Q. You took them directly west, down along the Indian reservation, on into Colorado?

A. No, sir.

Q. How did you take them?

A. I took them to the corral, the C. C. Corral on the McCracken Mesa, loaded them and took them to Blanding. Fed them for ten days. Nobody claimed them, and I took them to Coretz.

Q. By way of Monticello?

A. Yes.

Q. Mr. Black, are we to understand that you had had no difficulty with these Indians at any time? You don't consider the horse gathering as any difficulty—is that correct?

A. It was a range problem. The idea I wanted to give, I didn't have any personal trouble with the Indians. I have always been very friendly to them; always figure on being very friendly with them. I was raised among them. I think they are very respectable and good people. I never had any personal trouble with them at all.

Q. The only contact you had with them was in this horse gathering?

A. No. I have known most of them most of my life.

Q. Have you had any other contact as an official of the Bureau of Land Management?

A. No.

Q. Any difficulty with them?

A. No.

Q. No difficulty?

A. I served lots of trespasses on them, went to their camps, visited them and talked the thing over with them.

Q. You have seen their horses there practically all your life, have you, Mr. Black?

A. Yes.

Q. And their burros?

A. I don't know one burro from another.

Q. Saw them around their camps?

A. I have seen burros around the camps, yes. I couldn't identify them.

Mr. Oman: That is all.

Cross Examination.

By Mr. Thomas:

Q. Mr. Black, I hand you what is marked Defendant's Exhibit A in this case. Are you familiar with that exhibit, Mr. Black?

A. Yes.

[fol. 143] Q. I direct your attention to September 19, 1952. Did you pick up any horses from the federal range in the area involved in this lawsuit on that date—September 19, 1952?

A. Yes.

Q. Who accompanied you?

A. Leland Redd, Alma Redd, LaVar Lyman.

Q. You mentioned a Croft May; who is he?

A. He is deputy sheriff of San Juan County.

Q. Did you pick up any horses at that time? Did you gather any at that time?

A. Yes, sir.

Q. How many?

A. Fourteen head.

Q. Do you know where you gathered them at that time?

A. Yes.

Q. Where?

A. Just north of the National Monument Hovenweep.

Q. Is that in Utah Range District No. 6?

A. Yes.

Q. Were there any Indians in the vicinity of these horses at the time you picked them up?

A. No.

Q. Did you know to whom these horses belonged?

A. No.

Q. And where did you take these horses?

A. Took them to Blanding.

Q. What if anything did you do with these horses?

A. We took them to Blanding, put them in the corral, fed and watered them, kept them there for about two weeks. Then we shipped them to Kuhni Packing Company at Springville—between Springville and Provo.

Q. Did you sell them?

A. Yes.

Q. Did anyone appear to claim those horses?

A. No.

Q. Have you had experience with horses, Mr. Black, buying and selling horses?

A. Yes.

Q. How long experience have you had—over what period of time?

A. Since I was about sixteen years old.

Q. How old are you now?

A. Forty-six.

Q. Did you observe these horses you picked up at that time, these fourteen head?

A. Yes.

Q. Do you have an opinion as to the market value of these horses at that time?

A. Yes.

Q. What would be the market value of those, according to your opinion?

Mr. Oman: I don't believe he has laid a foundation to [fol. 144] show he knows anything about the value of the horses at the time with which we are involved, your Honor.

Mr. Thomas: September 19th.

The Court: I don't believe you have laid foundation.

By Mr. Thomas:

Q. How long since you bought and sold any horses?

A. I do it regularly, every year. I use quite a few horses.

Q. Did you do so in 1952?

A. Yes.

Q. Did you do so in September, 1952?

A. Yes.

Q. And was that in the vicinity of Blanding or Monticello?

A. Blanding.

Q. Did you sell these horses, fourteen head of horses, in Blanding?

A. No.

Q. Where did you sell them?

A. Kuhni Packing.

Q. Did you sell them in Blanding?

A. No.

Q. Where did you sell them?

A. We took them to the packing house between Springville and Provo.

Q. Where did you negotiate the sale?

A. Over the phone.

Q. At Blanding?

A. Yes.

Q. What was the market value according to your opinion, of those horses at that time?

Mr. Oman: I don't believe he is in a condition to express an opinion. He still has not laid foundation.

The Court: I don't think you have laid foundation.

By Mr. Thomas:

Q. Over what period of time have you bought and sold horses in and around Blanding?

A. In 1947—from the period of 1947 to 1950, I ran a ranch north of Monticello. I attended the stock sales there on an average of about once a month, sometimes oftener. I seen horses bought and sold, and cattle bought and sold, and pigs bought and sold. I made it my business to check the paper that listed the market of the animals.

The Court: That was 1947?

The Witness: Yes, until 1950.

By Mr. Thomas:

Q. Did you do so in 1952?

A. I attended a sale or two. I didn't make it a practice then.

[fol. 145] Q. In 1952?

A. Yes.

Q. Had you bought and sold horses in 1952?

A. Yes.

The Court: How many?

The Witness: I can't recall the exact number, but I sold four or five horses in 1952.

Mr. Thomas: I submit he is qualified as an expert.

The Court: Where did your sell them?

The Witness: Locally.

The Court: What do you mean by that? Where did you sell them?

The Witness: Just to individuals around Blanding, cowboys.

By Mr. Thomas:

Q. In Blanding?

A. Yes.

Q. What, in your opinion, was the market value of those fourteen horses that you sold, gathered on that date, Mr. Black?

The Court: That is not quite the question.

Mr. Thomas: I believe it is the measure of damages, if your honor please.

The Court: What I am talking about is your question.

By Mr. Thomas:

Q. Do you have an opinion as to the market value of those horses, those fourteen horses, in September, that you gathered on September 19, 1952?

A. Yes.

Mr. Oman: I object to him expressing an opinion on the experience he has shown. He has not shown yet what kind of horses he has dealt with at any time, nor what kind those were he sold.

Mr. Thomas: The court has indicated that is immaterial.

The Court: No, Mr. Thomas. Your problem is, the question is not what this man sold his horses for. The question is, what is the fair market value of horses on the date in question and at the place in question.

[fol. 146] By Mr. Thomas:

Q. Do you know what the fair market value of horses was at Blanding in September, at the time when these horses were sold?

A. When we started the abandoned horse program I called several places over the phone and inquired of the price of horses, what I could get for them, where there was a market for them.

Q. Do you mean when this particular program was inaugurated?

A. Yes.

Q. Was this the first band of horses you gathered under that program?

A. Yes.

The Court: That would be the basis of your answer, would it, the answer you got to those telephone conversations?

The Witness: I have my own opinion. I have dealt all my life——

The Court: What have you done down there in particular?

The Witness: I broke several horses and sold them in 1952. You can buy a raw horse for breaking it, and sell a gentle horse. You double the value of a horse after you break it.

By Mr. Thomas:

Q. Were these horses broke or unbroke?

A. Unbroke.

Q. Do you have an opinion as to what the fair market value of those horses was at that time?

A. Yes.

Q. What was it?

A. Two cents a pound.

Q. Did you haul them anywhere?

A. Yes.

Q. Where did you haul them to?

A. To Blanding.

Q. And from Blanding to Kuhni Brothers?

A. Yes.

Q. Were they sold to them?

A. Yes.

The Court: Is that what you got for them, two cents a pound?

The Witness: Three cents; they offered to pay a cent and a half and come and get them.

By Mr. Thomas:

Q. They offered to pay a cent and a half and come and get them at Blanding?

A. Yes.

Q. You received three cents for them delivered?
A. Yes.
[fol. 147] Q. What kind of horses were they?
A. They were small, unbroke horses, most of them poor in flesh; a few in fair condition. The majority of them was very small horses, averaged around about five hundred pounds apiece.
Q. I call your attention to September 23, 1952. Did you gather any horses in this program at that time?

Mr. Oman: We stipulated that in evidence.
The Court: Go ahead.
The Witness: What time?
Mr. Thomas. September 23, 1952.

A. Yes.
Q. How many?
A. Eight.
Q. Do you know where you picked those horses up?
A. Yes.
Q. Where?
A. On McCracken Mesa.
Q. Is that on the federal range?
A. Yes.
Q. What did you do with those horses?
A. We rounded them up, put them in the corral there.
Q. Whose corral?
A. A public corral made by the C. C. C. for the use of the sheep in that area. We rounded them up. Leland Redd was with me on that day we rounded them up and put them in the corral.
As we got them in there, some Indians came and we asked if they knew who the horses belonged to. They said no. They said they were going to turn them out, and started off to the corral to turn them out. I told them to leave the gate alone, not to open the gate. So they stepped back, left the gate closed.
Q. Do you know who those Indians were?
A. I know two of them.
Q. Who were they?
A. One was Jim Hatahley; the other Allen Nocki, his son-in-law.

Q. Are those Indians any of the Indian plaintiffs here, do you recognize?

A. No.

Q. They are not?

A. No.

Q. Were there any Indians around these horses at the time when you picked them up?

A. No.

Q. Where did you take the horses, if anywhere?

A. May I finish that? While we still had them in the [fol. 148] corral, I stated to Leland Redd, I asked him if he would go to Blanding and get a truck and take the horses to Blanding.

While he was gone Eddie Nocki came up to the corral, rode up on a horse. Evidently he had been over on the ridge watching us corral the horses. He came out. I asked him if he had any horses in the corral. He said no. I asked him is he knew who the horses belonged to. He said no, he didn't know whose horses they were. So when the truck came along, we loaded them in and took them to Blanding.

The Court: Eddie Nocki is not one of the plaintiffs?

The Witness: Yes; he is right down there. He didn't claim the horses.

The Court: Didn't claim those horses?

The Witness: No.

By Mr. Thomas:

Q. What if anything did you do with those horses?

A. They were taken to Kuhni's Packing Plant, except one horse—that was a Ute's horse. He claimed the horse and redeemed it, that Ute.

Q. Was that a Piute Indian?

A. Yes, a half-breed Navajo.

Q. Did he talk with you about it?

A. Yes.

The Court: That is immaterial. Let's get along with this.

By Mr. Thomas:

Q. In your opinion what was the fair market value of these horses at that time?

A. About two cents.

Q. A pound?
A. Yes.
Q. At Blanding?
A. Yes.
Q. What did you receive for them?
A. Three cents.
Q. Delivered.
A. Yes.
Q. To Kuhni?
A. Yes.
Q. I call your attention to September 25, 1952. Did you gather any horses from the federal range at that time?
A. Yes.
Q. How many?
A. Five horses, one burro.
Q. Do you know from where you gathered them?
A. Yes.
[fol. 149] Q. Where did you pick those up?
A. At Bluff.
Q. Was that on the federal range?
A. Yes.
Q. Were there any Indians around there at that time?
A. No.
Q. Did any Indians come and claim the horses?
A. No.
Q. What did you do with them?
A. Five of them were redeemed, and one burro shipped to the packing company.
Q. Redeemed by whom?
A. White men.
Q. At Blanding?
A. At Bluff. I had talked to those white men before. I told them to move these horses. They told me the horses was there, and they were going to stay there.

The Court: That is immaterial.

By Mr. Thomas:

Q. I call your attention to September 26, 1952. Did you pick up any horses from the federal range at that time?
A. Yes.

Mr. Orman: I will stipulate if he is asked the same question with regard to all the horses listed on here, it will be his testimony that they are worth two cents a pound.

Mr. Thomas: Of course anything I ask with respect to the circumstances concerning the picking up——

The Court: Don't repeat now.

By Mr. Thomas:

Q. Do you know where you picked them up?
A. Yes.
Q. Where?
A. Rim Spring Point.
Q. There were eleven horses?
A. Yes.
Q. Were there any Indians near those horses at the time you picked them up?
A. No.
Q. Did any Indians claim these horses?
A. Yes.
Q. Which Indians?
A. The Utes.

The Court: Of what importance is that? Let's get down to something that is material.

By Mr. Thomas:

Q. I call your attention to October 9, 1952. Did you gather any horses at that time from the federal range?
A. Yes.
Q. Were there any Indians near the horses at that time?
A. No.
Q. Did you sell those horses?
A. Yes.

[fol. 150] Q. You say one was redeemed, I believe. Do you know who redeemed it?
A. Yes. McKee Holding (?), a Ute Indian.
Q. Did any Navajo Indian contact you about these horses?
A. Some of these horses sold locally to some of the people that wanted a horse. Later, about six weeks, there was a Navajo came and said one of them belonged to him.
Q. Which Navajo?

A. I don't recall his name.

Q. Did you tell him what happened to the horse?

A. Yes. He went and talked to the man. I went with him, and asked the man if he would let him have the horse back. The man sold his horse back to him.

Q. Was that Navajo one of these plaintiffs?

A. No.

Q. I call your attention to October 10, 1952. Did you pick up any horses at that time?

A. Yes.

Q. How many?

A. Six horses and a burro.

Q. Did you pick those up from the federal range?

A. Yes.

Q. Were any Indians around those horses?

A. No.

Q. Did any Navajo Indian contact you respecting these horses and the burro?

A. No.

Q. You sold these horses?

A. Yes.

Q. For the same price?

A. No. One or two of them horses was sold for twenty dollars apiece.

Q. I call your attention to October 27, 1952. Did you pick up any horses under this program at that time?

A. Yes.

Q. How many?

A. Two.

Q. Were they on federal range?

A. Yes.

Q. Were there any Indians in the immediate vicinity of these horses at that time?

A. I didn't see any.

Q. Did any Navajo Indian talk to you about them?

A. No.

Q. Did you know to whom they belonged?

A. No.

Q. Both of these horses were sold to Kuhni Packing Plant?

A. Yes.

Q: At that same price, two cents a pound?
A. Three cents.
Q. Delivered?
A. Yes.
Q. I call your attention to October 31, 1952. Did you [fol. 151] pick up any horses at that time under this elimination program?
A. Yes.
Q. How many?
A. Fifteen horses and one burro.
Q. That is October 31, 1952——

The Court: You have stipulated to all this, haven't you?
Mr. Thomas: Yes, but there is no stipulation with respect to the circumstances concerning the picking of them up.
The Court: That is part of your case, if anything. Let's discontinue it.

By Mr. Thomas:

Q. Did you post any notices?
A. Yes.
Q. I direct your attention to what is marked Defendant's Exhibit B in this case and ask if you recognize that exhibit?

The Court: That is outside the scope of the direct examination.
Mr. Thomas: Yes, it is. I was allowed to go into it with the other witness.
The Court: I am not going to let you put your whole case on.
Mr. Thomas: That is all.

Redirect examination.

By Mr. Oman:

Q. Mr. Black, you arrived at the value of these horses by finding out what you could get at the by-products company?
A. Yes, and the Curtis Sale Barns. The by-products offered the highest price I was offered at the places I have inquired.
Q. For immediate sale?

A. Yes.

Q. Did you try riding each of these horses you gathered?

A. No.

Q. A lot of these horses were broke horses, weren't they?

A. A few.

Q. How do you know?

A. We had to handle them in putting them in the corral and in the truck. We caught a lot of them and put them in the truck.

Q. These horses were branded, weren't they?

A. Some of them.

[fol. 152] Q. How many of them? Do you have a record of it there?

A. No.

Q. A great majority of the horses were branded, were they not?

A. I recall one truckload that had seven out of twenty-four unbranded. It ran about that.

Q. The unbranded horses were the colts and yearlings, weren't they?

A. No, they were grown horses in some cases.

Q. You checked those brands?

A. Yes.

Q. You checked them and made sure they were not recorded to the white men?

A. Yes, and to the Indians, both. And I made sure they wasn't recorded.

Mr. Oman: That is all.

Mr. Thomas: Is Mr. Black excluded?

The Court: No—you are going to use Black again, on direct?

Mr. Thomas: Yes.

The Court: Then exclude him.

The Court: Don't talk to anybody about your testimony in here.

Mrs. Pearl Butt, testified as follows:

Direct examination.

By Mr. Oman:

Q. Will you state your name, please?
A. Pearl Butt.
Q. Are you the county clerk of San Juan County, Utah?
A. I am.
Q. Were you such in 1952?
A. Yes, sir.
Q. You reside in Monticello?
A. Yes, sir.
Q. And you are the clerk for the county commissioners for San Juan County?
A. Yes.
Q. You attend all the county commissioners' meetings?
A. Yes, sir.
Q. Mrs. Butt, I call your attention to a meeting held by the county commissioners on September 2, 1952. Do you recall that meeting?
A. Yes.

(Plaintiffs' Exhibit 1 was thereupon marked by the reporter for identification.)

[fol. 153] Q. I hand you what purports to be a certified copy of the minutes of that meeting, Mrs. Butt, and ask you if you can identify it?
A. Yes, sir, that is a certified copy of the minutes I made for you.
Q. Mrs. Butt, do you have the official records here of the minutes of all meetings held by the county commissioners in 1952?
A. Yes, sir, I do.
Q. At this September 2nd meeting the county commissioners considered, didn't they, the elimination of these Indian horses?
A. It was September the 2nd, of 1952, that I was told to incorporate this resolution into the minutes. It had been discussed briefly, not in too great detail, in July, at the July meeting—I am not sure of the date—whether that

was the 1st or 2nd of July—I could find it—but it didn't go on record at that time as to what would be done.

Q. At this September 2nd meeting of 1952, the board then inserted it in the minutes?

Mr. Thomas: I object to that as leading.

The Court: The objection is overruled.

The Court: Go ahead.

A. Yes.

By Mr. Oman:

Q. They inserted on that date in the minutes this resolution that they would cooperate in the elimination of abandoned horses?

A. That is correct.

Q. In no other meeting of 1952 is any mention made in the minutes of the commissioners relating to this matter?

A. Not in 1952—nothing in the minutes. It could be it was my fault for not putting it in the minutes. They did discuss it. That could be my fault.

Q. You told me when I discussed it with you and went over the records with you in your office that there was nothing?

A. There was nothing, no.

Mr. Thomas: I object to that as argumentative and leading.

The Court: Overruled.

The Witness: I told you at that time——

The Court: This is an adverse witness.

[fol. 154] Mr. Thomas: No, this witness is not adverse.

The Court: I am not so sure. The objection is overruled.

Mr. Oman: Answer the question.

A. I think I told you when you were there in my office—you asked me if there was any discussion at that time about it. In September I told you, not particularly, that I was told to put that in the minutes at that time.

Q. Who told you that?

A. I don't know for sure which one of the commissioners. They were all there.

Q. Can you refer to your records and say which one told you?

A. It was a motion at that time—if I am not very much mistaken it was a motion at that time.

Mr. Oman: I offer Exhibit 1 in evidence.
The Court: Any objection?
Mr. Thomas: No objection.
The Court: Received.

(Plaintiffs' Exhibit 1 was thereupon received in evidence.)

A. John D. Rogers was one of the commissioners at that time; Leon W. Adams was another. J. W. Crowley was chairman at that time. The motion was made by Rogers, seconded by Adams; carried unanimously to insert this resolution into the minutes.

By Mr. Oman:

Q. Into the minutes of the September 2nd meeting?
A. That is right.
Q. Refer to the record. Read the minutes you have for July 9th meeting, or any meeting close to July 9th of 1952.
A. It was on July 1st.
Q. Tell us, if you have already read it, whether there is anything in that relating to abandoned horses?
A. There is not.
Q. Was there any meeting held between July 1 and September 2nd?
A. Not regarding——
Q. Regarding anything.
A. Yes, we had a meeting.
Q. Will you refer to that?
A. In August—on August 5th.
Q. Look it over, and tell us if there is anything in the minutes of that meeting that in any way refers to the elimination of these Indian horses.
A. No, there is not.

[fol. 155] Q. Was there any meeting held between the date of that meeting and the September 2nd meeting?
A. No, sir.
Q. You have looked through all the minutes of the commissioners' meetings for the year 1952, and I understand

only in the September 2nd meeting was anything considered relating to the Indian horses?

A. That is correct, so far as actual minutes inserted in the minutes.

Mr. Oman: That is all.

Cross-examination.

By Mr. Thomas:

Q. Did you attend the meeting of July 1, 1952?

A. Yes, sir.

Q. Was there anything done there in that meeting by the county commissioners respecting the elimination of abandoned horses?

The Court: Are you impeaching the minutes?

Mr. Thomas: Possibly if there is nothing in the minutes, possibly it is her fault.

The Court: This is the official action of the board as disclosed in the minutes.

Mr. Thomas: I feel I should make a record here, your Honor.

The Court: Make any record you please.

By Mr. Thomas:

Q. Did you attend that meeting in July?

A. Yes, sir.

Q. Was there anything done there with respect to the passing of a resolution?

The Court: The court is not going to permit you to impeach these minutes.

Mr. Thomas: You may answer.

A. Not officially, no, sir.

The Court: She may not answer.

Mr. Thomas: Excuse me.

The Court: Are you the judge of this court?

Mr. Thomas: No, I am not, if your Honor please.

[fol. 156] The Court: Then don't tell the witness what to do.

By Mr. Thomas:

Q. Did you ever see this resolution, this Exhibit C, Mrs. Butt?

A. Yes, sir, I did.

Q. Do you know anything about that? Do you know when it was passed?

The Court: That is the minutes, she just read us that resolution, she just read us the minutes. She said Rogers made the motion and somebody else seconded it, and it was unanimously adopted. Of course she has seen that.

Mr. Thomas: If this resolution be in those minutes——

The Court: She said the motion was made at that time. What difference does it make whether in the minutes or not? I am not going to permit you to impeach the official records of the county commission. These are the minutes.

By Mr. Thomas:

Q. You mentioned that it might be your fault that something was not in the minutes. What did you have in mind?

Mr. Oman: I object to it as incompetent and immaterial, whether it is her fault or not.

By Mr. Thomas:

Q. Who prepares these minutes?

A. I do.

Mr. Thomas: That is all.

Recross-examination.

By Mr. Oman:

Q. Mrs. Butt, did the county commissioners ever pay out any money for expenses involved in eliminating these Indian horses?

Mr. Thomas: I object to it as immaterial.

The Court: Overruled.

A. Yes, they did.

By Mr. Oman:

Q. They did?

A. Yes, sir. They paid for the publishing of that notice.

Q. Do you have a record of that amount?

A. I do. I have the bill presented from the San Juan Record right here, with the stub of the check that paid it.

Q. $9.20?

A. Yes, sir. It was paid along with other things, so the [fol. 157] check will not show for that particular amount, because we paid it with other bills.

Q. Did the county commissioners receive any money from the disposal of these Indian horses?

A. They did not.

Q. They didn't receive any money from the Advisory Board of the Grazing District?

A. No, sir.

Q. Did the county commissioners have any communication with the Advisory Board relative to eliminating these Indian horses—any correspondence?

A. Not that I wrote.

Q. Did you receive any?

A. No, sir.

Q. Did you have contact with Mr. Kinnaman about this program?

A. Only when he was there and talked about it, was the only time he talked in a meeting.

Q. What meeting is that?

A. July 1st, I believe it was.

Q. And you said there was no reference to this then?

A. I said I didn't put anything in the minutes, because there was nothing officially done.

Q. Did you have any contact, yourself, with Mr. Kinnaman o with any of the Bureau of Land Management people after that date?

A. I am not right sure whether Mr. Kinnaman brought me the notice to sign before it was sent, or whether he had handed it to the commissioners. But I signed it. The notice that went to the paper would have my signature on.

Q. He had prepared it and brought it to you?

A. I am sure of that now—either he brought it to me or gave it to the commissioners to hand to me. I did sign it.

Q. You didn't prepare it?

A. No, I didn't prepare it.

Recross-examination.

By Mr. Thomas:

Q. You signed notice as county clerk of San Juan County?

A. Yes, sir.

Q. That is the notice marked Defendant's Exhibit D, that is attached to that exhibit?

A. Yes, sir.

Mr. Thomas: That is all.

Mr. Thomas: I don't have any objection if she wants to be excused.

[fol. 158] Claude Foy, testified as follows:

Direct examination.

By Mr. Oman:

The Court: I have some other work I ought to be getting on. How long is this witness going to take?

Mr. Oman: Not very long, your Honor.

The Court: All right—examine this one, then we will quit.

By Mr. Oman:

Q. Will you state your name?

A. Claude Foy.

Q. Where do you reside, Mr. Foy?

A. Montizello, Utah.

Q. Were you residing there during all of 1952?

A. Yes, sir.

Q. Down to the present time?

A. Yes, sir.

Q. Are you the State Brand Inspector at that point?

A. Yes, sir.

Q. Mr. Foy, can you tell me whether you inspected livestock during the year 1952, and down to and including March of 1953, at the request either of Mr. Dale Kinnaman or Dee Black?

A. Yes, sir.

Q. You know both those gentlemen, do you?

A. Yes, sir.

Q. Will you tell is, Mr. Foy, referring to your official records, if you have them with you, on what date you made these inspections and where you made them?

A. If it is in order, the first inspection was made at my place of business in Monticello on September 30, 1952.

Q. At whose request?

A. Well, I believe it was at Dee Black's request; I don't remember. Bob Krumm came once or twice. Dee came the rest of the time.

Q. Your certificate doesn't show that?

A. No.

Q. When is the next inspection you made?

A. The next inspection was November 4, 1952.

Q. The next one?

A. Was December 19, 1952.

Q. The next one after that?

A. December 26, 1952.

Q. And the one following that one?

A. — was January 1, 1953.

Q. Did you have one following that, in 1953?

A. February 24, 1953.

Q. Did you have one in March?

A. No, none in March.

[fol. 159] The Court: What is inspecting?

By Mr. Oman:

Q. In each instance, Mr. Foy, were you inspecting only horses?

A. Horses and burros and mules.

Q. Did you inspect them while they were loaded in a truck?

A. Yes, sir.

Q. You didn't unload them to look at the brands?

A. No.

Q. Did you look at each animal?

A. Yes.

Q. Move them around so you could see the brands?

A. We had a bill of sale, and the brands listed, from the Advisory Board to the Springville Hatchery.

Q. You mean the brands had all been written on a piece of paper, and you were shown that?

A. A bill of sale was issued from the Advisory Board in Monticello to the Springville destination.

Q. That is the Advisory Board of the Sixth Utah Grazing District?

A. Yes, sir.

Q. Who presented you with the bill of sale?

A. Dee Black and Mr. Krumm.

Q. In every instance it was a Bureau of Land Management employee?

A. Yes.

Q. The bill of sale was made from the Advisory Board to Kuhni Packing Company?

A. I don't remember who it was made to, but it was made and signed by the Advisory Board.

Q. Do you remember who the person was who signed as a member of this Advisory Board?

A. No. I remember some of the names. Lloyd Adams' name was on one, I believe.

Q. Did Mr. Black and Mr. Krumm and the other Bureau of Land Management agents tell you they were horses belonging to the Advisory Board?

A. Yes, sir; the bill of sale showed it.

Q. I notice your slips are made to indicate the Advisory Board is the shipper of the horses?

A. That is right.

Q. These Bureau of Land Management people told you that was the name you were to put on your inspection slip?

A. Yes, sir.

The Court: I don't understand. By whom was this man employed?

[fol. 160] The Witness: The State Department of Agriculture.

The Court: What did you have to inspect the horses about?

The Witness: To give them clearance so they could ship them out of the state, or out of any district in the state.

The Court: To ship them to Springville?

The Witness: Yes. The law requires them to have them inspected if they ship them out of the district.

The Court: Have you that invoice you talk about that had the brands marked on it?

Mr. Oman: No, he doesn't have that.

The Witness: The Division of Grazing that was surrendering them brought it up with the horses to Springville.

The Court: They had a bill of sale?

The Witness: Yes, sir.

The Court: Do you want the government to produce that?

(Plaintiffs' Exhibit 2, consisting of six pages, was thereupon marked by the reporter for identification herein.)

Mr. Thomas: I suggest it might be all one exhibit—Exhibit 2, of six pages.

The Court: What are these?

Mr. Thomas: Those are the brand inspection certificates issued by Mr. Foy as State Brand Inspector.

The Court: Any objection?

Mr. Thomas: No—may I ask one question?

Mr. Thomas: Did you write those—did you prepare them?

The Witness: Yes, sir.

Mr. Thomas: No objection.

The Court: May be received.

(Plaintiffs' Exhibit 2 was thereupon received in evidence.)

[fol. 161] Mr. Oman: That is all.

Cross-examination.

By Mr. Thomas:

Q. Mr. Foy, you wrote down on these slips the brands you saw on these horses?

A. The brands they gave me on the certificate. It is impossible to check the brand on the stock while in a truck. It is impossible sometimes to check on some brands.

Q. Did you have any reason to think the brands given to you were not the brands on the horses?

A. No, sir.

Mr. Thomas: I don't see that it makes any difference——

The Court: That is not material.

By Mr. Thomas:

Q. Were any of those brands recorded?

A. Not to my knowledge. I don't have to go into the recording end of it.

Q. They were not recorded of your knowledge?

A. I have no knowledge.

Q. You don't know?

A. No.

Q. Isn't it your duty to determine——

The Court: He does not know.

A. No, it is not our duty. We merely give the man a clearance. We don't care where he got the animals. He has got to have clearance before he can go on with it. Then we have a record of it.

Mr. Thomas: That is all.

Mr. Oman: No further questions.

Mr. Oman: May he be excused?

The Court: All right, he may be excused.

The Court: What else did you plan this afternoon? What is the next witness?

Mr. Oman: I have further witnesses, a good many of them, your Honor.

The Court: I think we will recess until tomorrow morning at ten o'clock. How long is this case going to require? [fol. 162] Mr. Ohman: I believe possibly three or four days.

The Court: We are not going to take three or four days. You fellows told me this case would take two days. I have set up a calendar of cases to follow it, with witnesses out of the state and all that sort of thing. How long do you think your side is going to take, Mr. Thomas?

Mr. Thomas: Should not take longer than half a day to put on our case.

The Court: Why should your case require so much time, Mr. Oman?

Mr. Oman: It is very laborious and slow in questioning these people. They speak no English.

The Court: I understand we are going to have an interpreter. You can talk through the interpreter as fast as you like. How many of the Indians are you going to use?

Mr. Oman: I have about sixteen; I believe. I will not use more of them than necessary—possibly not more than five or six, to show to the court the full story of this case.

The Court: It is an unfortunate thing to keep these people up here any longer than is necessary. I think we ought to move along with this case. I am sure it is a hardship upon them to have to be up here in this community. So I want to expedite it as best we can.

Mr. Oman: We should like to cooperate in that. We will do everything we can to expedite it.

The Court: You better review your evidence and get it into shape so you can put it on rapidly. Eliminate the duplication of matters that are not material, so we can move this along. Have you had an opportunity to talk with your witnesses yet?

Mr. Oman: Yes, I have talked with them as best I could. It is a pretty difficult thing.

The Court: You have interpreters, don't you?

Mr. Oman: Yes, we do.

[fol. 163] The Court: Are these people being taken care of pretty well out here?

Mr. Oman: They are taking care of themselves, your Honor. They are unable to stay in hotels; too much expense to them. They are staying out here on a tract of land.

The Court; I don't want anybody to suffer from having to attend this court. So if there is any assistance we can give them, we want to help them. We will shorten the proceeding as much as we can. And if there is any hardship the court can assist with, I wish you would let me know about it.

The Court will be in recess.

Mr. Thomas: If the court please, I am advised by Mr. Oman that he intends to put on witnesses other than agents of the government. As I understand the court's exclusion rule, that applied only to the time when the government agents testified?

The Court: I am going to exclude the government agents during the entire proceeding. All the government agents will withdraw.

Mr. Thomas: May I call your attention to the fact that Mr. Black is a very important witness——

The Court: He is going to stay here until this lawsuit is over.

Mr. Thomas: May he stay in the court?

The Court: No. He is excluded, too. I want these government agents excluded from the court room—all of them.

Mr. Thomas: That includes the county commissioners, too?

The Court: Yes, the county commissioners too.

Mr. Thomas: May the defendant have an objection to that, if your Honor please? We feel that is prejudicial to the defendant's case. I am not familiar with the case sufficiently to be able to intelligently cross-examine these witnesses without the aid of Mr. Black, particularly.

[fol. 164] The Court: Well, you have had all morning. I had to recess all forenoon until two o'clock this afternoon to enable the emergency Court of Appeals to hold its hearing here. You had all that time with these witnesses at your disposal to familiarize yourself with this case.

Mr. Thomas: I know what they will testify to. If your Honor please, I don't know what the Indians will testify to.

The Court: You know what this case is all about. It is a simple case, a case in which it is claimed there has been wilful destruction of the Indian horses. It is my judgment, and I so find, that there is nothing peculiar about this case, nothing difficult about this case. It is a very simple case. And you had time before trial to prepare for it. We have spent a full day in trial. You familiarized yourself with it. You have had since last evening at four-thirty. I recessed early last night for the benefit of you lawyers. We have been in recess all day today until two o'clock. That is enough.

These government witnesses, particularly the first one—what was his name—Mr. Kinnaman—has shown great reluctance, in the judgment of the court, to explain this matter. He has made inconsistent statements. He at first said that he hadn't talked with anybody about the problem of these Indian horses, and that was not involved in the abandoned horse program, that they were just trying to clear the reservation of all abandoned horses.

He has in large measure repudiated his testimony on that.

He has shown great reluctance to tell the court about just what happened here. With the greatest difficulty have we drawn out of him his testimony. I am going to find out what the truth of this matter is. For the benefit of the plaintiffs in this case I am invoking the rule of exclusion of witnesses. You may have your objection; and it is overruled.

As a matter of fact, these people are here under very adverse circumstances. It has been snowing for two days, and a cold wind out here in the pasture south of town, with their squaws and babies and young folks—all because the United States of America, the guardian, acting through [fol. 165] the Bureau of Land Management, attempted to drive them from their homes—destroyed their cattle, destroyed their horses. These people are just here trying to get justice. If I can give it to them, I am going to do it.

Now, it is just ordinary procedure, Mr. Thomas, in this court, and in other federal courts I have sat in, to invoke the rule of exclusion of witnesses. It is in an ordinary case. This is an extraordinary case, in view of the dissimulation evidenced by the witness Kinnaman—by his reluctance to testify, by the contradictions in his testimony; and I think the government is in a pretty small business through the United States Attorney to make an objection of that sort. As a matter of fact, it has no ground in any case. It is an ordinary rule of exclusion of witnesses. You may proceed.

Mr. Oman: I will call Jim Joe's daughter. We will need an interpreter, if your Honor please.

The Court: Are you through cross-examining this government witness at this point?

Mr. Oman: At this point I am. I would like to put on testimony, and have a right to recall——

The Court: Proceed in your own way. Take your time. I want a complete development of this whole situation. I am beginning to see it is a very serious matter. The United States Government ought to be trying to help these people. They are wards of the government. The government has assumed responsibility for looking out for them. And here the United States is making captious objections in the attempt of the court to do justice in this court.

(Alfred Bowman was duly sworn as interpreter herein.)

JIM JOE'S DAUGHTER, testified as follows, the examination being conducted through the medium of an interpreter.

Direct examination.

By Mr. Oman:

Q. State your name, please.
A. Jim Joe's Daughter.
Q. Where do you reside?
A. Bluff; it is below Bluff City—Benton Wash.
[fol. 166] Q. That is in Utah?
A. Yes.
Q. Do you own any livestock?
A. Yes, I have livestock—goats, sheep, horses.
Q. Do you own any lands?
A. Yes.
Q. Are you acquainted with the area we talked about in this court yesterday—the area from which horses were taken?
A. Yes.
Q. And are these lands you own located in this area?
A. Yes.
Q. How long have you owned these livestock?
A. This stock has been handed to me from my father. My father and mother owned this livestock before they handed them over to me.
Q. Do you mean you have had these livestock all your life?
A. Yes.
Q. Have you been taking care of these livestock yourself for some time?
A. Yes.
Q. For how many years?
A. I started to take care of these livestock since I was able to—six or seven years of my age.
Q. Did you use these lands that you own to graze these livestock upon?
A. Yes.
Q. I ask you if you know Dee Black, the man who testified in this court yesterday?
A. Yes.
Q. Did Dee Black ever talk to you down in this area where you owned these lands?

A. Yes. He came down there and run me out of my land. I questioned him why he had to do that; told him, this is my ancestral place of habitation. And he didn't heed it. He told me to go back across the river.

Q. Did he tell you anything he might do if you didn't go back across the river?

A. The day he came down and asked me to move across the river, he gave me seven days to move across it. If I was found after the seven-day period, he would come down and confiscate all my livestock, children, and have me put in jail.

Q. When did he do this?

A. It was on the first part of the fall, around in the month of September, thereabouts someplace. I don't know the exact date.

Q. Would this be this year, or some year before?

A. That is a year ago this last fall.

[fol. 167] Q. Did this cause you to be frightened or concerned?

A. I was so scared and afraid that this would happen to me and my family—so the following day I have to move across the river.

Q. You mean by that, you took your children and your sheep and goats and went across the river?

A. Yes.

Q. And have you come back to these lands you own since that time?

A. No. I am so afraid of them I still am living on the south side of the river.

Q. Now tell us what you mean by "the river". What river is that?

A. It is the San Juan river.

Q. Is the area south of that river within the Navajo reservation?

A. Yes.

Mr. Oman: That is all.

Cross-examination.

By Mr. Thomas:

Q. Did you live on the reservation south of the San Juan river before occupying these lands north of the river?

A. No, I am living on the north side of the river, where my allotment is.

Q. Is the land on which you resided north of the river in the Indian reservation?

A. Yes.

Q. Is that land part of the Navajo Indian Reservation?

A. Yes.

Q. Were you grazing your horses and livestock on the land on this reservation?

A. Yes.

Q. Did you have any of your livestock grazing in any part of San Juan county not on the Indian reservation?

A. I have been moving my livestock north of my allotment which we occupied there for centuries, where we run our livestock all the time. That is where I have been having my livestock before I was chased out of there, south of the San Juan river.

Q. Was this allotment given to you or granted to you by the United States government?

A. This was handed down to me from my father, and he must have been an allottee to start with. It was handed down to me.

Q. Did you get a deed for this property from anyone?

Mr. Oman: I object to the form of the question. She wouldn't understand what that means. He should reframe it.

[fol. 168] The Court: Sustained. As a matter of fact, it was handed down from her father. That is about as far as you could go with that.

Mr. Thomas: May I confer with Mr. Oman just a minute, if your Honor please?

The Court: Certainly.

By Mr. Thomas:

Q. Do you own this land where you lived, north of the San Juan river, or does the government own it?

A. That is my land.

Q. Did you get any papers for it from the government?

A. Yes.

Q. And this is the land where your stock was grazing, was it?

A. Yes.

Mr. Thomas: That is all.

Mr. Oman: That is all.

ETHEL SAKEZZIE, testified as follows, the examination being conducted through the medium of the interpreter:

Direct examination.

By Mr. Oman:

Q. Will you state your name, please?

A. Mary Ethel Sakezzie.

Q. Are you the wife of one of the plaintiffs in this action?

A. Yes.

Q. Your are the wife of Hosteen Sakezzie?

A. Yes.

Q. Where do you live?

A. Montezuma Creek.

Q. Are you acquainted with the area with which this action is concerned about the elimination of Indian horses?

A. Yes, I do know.

Q. Do you live within that area?

A. Yes.

Q. How long have you lived there?

A. I do know we lived there all the years that I know of. Prior to me, my father and my mother lived there.

Q. Do you own livestock?

A. Yes.

Q. Do you own any sheep?

A. Sheep, cows and goats.

Q. Do you also own horses?

A. And horses.

Q. How long have you owned sheep?

A. I have owned livestock all my life. Before that my father and mother owned livestock.

[fol. 169] Q. Do you, yourself, and have you for years, herded and grazed there livestock out in that range?

A. Yes.

Q. Have you grazed them inside the area from which these horses have been taken?

A. Yes.

Q. During the time you have herded sheep in this range have you had any contact with Dee Black?

A. Yes.

Q. You know who Dee Black is, do you?

A. Yes. In fact, he threatened to handcuff me this past spring.

Q. Will you tell us if Dee Black has molested your sheep while you have been herding them?

Mr. Thomas: If your Honor please, I think I should object to that, it not being within the purview of this case.

The Court: It is preliminary, I think. Overruled.

By Mr. Oman:

Q. Has Dee Black molested you in your livestock operations in this range area?

A. Yes.

Q. When did this happen?

A. A year ago.

Q. Where was this?

A. It is at Montezuma Creek.

Q. Can you tell us what direction from where you live, and how far?

A. It is the north side of where I am residing.

Q. Can you tell us how many miles?

A. I don't know what the mileage is, the matter of distance.

Q. How long a ride on a horse?

A. About an hour riding to the place.

Q. Now tell us what happened.

A. They were taking our sheep away that day. Four

Navajo ladies were handcuffed together between each other, and taking our sheep away had given us a bad experience —so bad it hurts our hearts. And the bruises we got from being handcuffed together like they did that day.

The Court: Find out who did that.

By Mr. Oman:

Q. Did Dee Black do this?

A. Dee Black; they call him the ranger there; and the sheriff. There were four of them. I do know one is a sheriff. There were four men.

Q. Do you know Leland Redd?

A. I don't know him.

Q. All you know is, Dee Black and some man you believed was the sheriff—is that all you knew?

A. Yes.

[fol. 170] Q. Were your arms cut so they bled in this handcuffing?

A. It took their skin off by handcuffing them, and it bled, made it very sore.

Q. Did Dee Black take your sheep while you were handcuffed?

Mr. Thomas: Object to that as not being within the purview of this case.

The Court: You are going to get to the horses, aren't you?

Mr. Oman: Dee Black testified yesterday he had no contact at any time.

The Court: Objection overruled.

Mr. Oman: I shall show he has tortured these people in many ways.

Q. Did Dee Black take your sheep away at that time while you were handcuffed?

A. That is right. He took our sheep away while we were handcuffed.

Q. How did he take them away—drive them?

A. They put them in a truck.

Q. Did they unhandcuff you that day, or when were you unhandcuffed?

A. After they took away our sheep, then we were crying there because we lost our livelihood, and they handcuffed us.

Cross-examination.

By Mr. Thomas:

Q. Did this happen to you September last year?

A. This has happened in the month of July, the middle of the summer.

Q. Last year?

A. Yes.

Q. Did Dee Black actually handcuff you?

A. I don't know exactly who did, but they all came about at the same time and handcuffed us together.

Q. Don't you remember that the sheriff handcuffed you at that time?

A. He may have.

Q. And were you fighting with the sheriff before you were handcuffed?

A. Yes, we fought him when they were handcuffing us.

Q. Well, before they handcuffed you were you fighting them?

A. Because we were herding those sheep they wanted [fol. 171] to load, they had to catch us and handcuff us.

Mr. Thomas: I don't understand that.

A. We were herding those sheep that were supposed to be loaded in those trucks, when they got us and handcuffed us.

Q. Did the sheriff ask you why you were moving the sheep?

A. No. We don't know, because we don't understand his language; neither does he.

Q. Did you have an interpreter there with the sheriff at the time?

The Court: Well, they didn't have any interpreter with the sheriff. I don't think that question is well framed.

By Mr. Thomas:

Q. Was there an interpreter there with the sheriff?

A. There was no one there that could translate between them.

Q. Did the sheriff take your sheep before you resisted?

A. Yes, they were already moving those sheep; when we tried to stop them, they went at us and handcuffed us.

Q. Do you know why the sheriff was taking the sheep, Mrs. Sakezzie?

A. I don't know.

Mr. Thomas: That is all.

Redirect examination.

By Mr. Oman:

Q. Did some of these men hold you while some one alone put the handcuffs on?

A. Yes.

Q. One man didn't do this alone, is that right?

A. That is the way they handled us. One of those men had to be holding us, two of us together, and one would bring the third one in; that is the way the sheriff handled us.

Q. Did Dee Black hold you or put the handcuffs on, either one?

A. I couldn't recall that. It happened there so fast.

Q. Was everybody who was there involved in this struggle trying to get the handcuffs on you women?

A. Yes.

Q. Were you women alone in that range?

A. Yes, just us women folk were there.

Recross-examination.

By Mr. Thomas:

Q. Where were the men?

A. They were about there working in their own sphere of life.

[fol. 172] Q. They saw this happen, did they?

A. No.

Redirect examination.

By Mr. Oman:

Q. Who was with you, and who were these other three women?

A. Those other ladies are present here in this room.

Q. Can she tell who they are?

A. I don't know their English names.

Mr. Oman: That is all.

IRENE BIG JOHN testified as follows, the examination being conducted through the medium of the interpreter:

Direct examination.

By Mr. Oman:

Q. Will you state your name, please?

A. Irene Big John.

Q. Where do you live?

A. Montezuma Creek.

Q. Are you acquainted with the area of range with which we are concerned in this lawsuit?

A. Yes.

Q. Have you operated livestock in that range?

A. Yes.

Q. For how long have you done that?

A. All the years that I have been there.

Q. How many years have you been there?

A. It must have been many years, because my grandmother and my greatgrandmother have lived there before I came into being.

Q. Did you hear the testimony of Ethel Sakezzie?

A. Yes.

Q. Were you one of the women who was with her at the time she testified she had been handcuffed to other women?

A. Yes, I am one of them.

Q. Were you handcuffed to these other women?

A. I happened to be the one handcuffed to this first lady that testified. We were handcuffed together.

Q. Was Dee Black present?

A. He is the one that led these men out to us.

Q. You know Dee Black, do you?

A. Yes.

Q. Do you know for whom he works?

A. I don't know his superiors. I do know Dee Black.

[fol. 173] Q. Do you know whether he is a government ranger or not?

The Court: You don't need to find out from her. We know about that.

By Mr. Oman:

Q. Have you, other than this experience about which you have just testified, had any other contact with Dee Black in this range area?

A. Prior to that I had contact with him. He took my sheep away that time, too.

Q. Where was this in this range area? Was it in this range area we are involved with in this action?

A. It is a little farther up north where they took my sheep.

Q. Now, tell us about that. Who was there, what did they do?

A. In my experience with them, there were seven men came at that time when they took my sheep. I had herded the sheep all that morning, forenoon. When I came in with my sheep at the lunch hour, with one of my babies about this high (indicating), that baby and I were the only ones at the camp at that time, when these seven men appear at my camp.

Q. Was Dee Black one of those seven men?

A. Yes.

Mr. Thomas: I object to this, if Your Honor please, the same objection, not within the purview of this case.

The Court: This is going to intent, wilfulness; also is directed to the credibility of Dee Black. He said he had no trouble with these people at all. Go ahead, Mr. Oman.

By Mr. Oman:

Q. Did I understand you to say Dee was the leader of this group of men?

A. Yes.

Q. Did he touch you in any way? Do I understand you to say he handcuffed you at this time?

A. At that time they just went into the corral where my sheep were bedding down for the noon hour. They came down and took up a club and beat up my sheep to move them away.

Q. Did they take them away?

A. There were three trucks that came down at that time, two bigger trucks and a pick-up. After they beat up my sheep to the point where they wanted to load them, they load these sheep in these three trucks and move them away.

Q. Did you ever get your sheep back?

[fol. 174] A. They didn't load all my sheep on the first loading. They had to move part of the sheep and move them up to another place where they get the balance of them.

Q. Did she get her sheep back from these men?

A. After they haul all my sheep away, of course we have to follow them up to get my sheep back. And they were penned up by Blanding. They have penned my sheep up there. I had to pay to have my sheep back.

Q. How much did you have to pay?

A. I paid $480.

Q. To whom did you pay that?

A. Leland Redd.

Mr. Oman: That is all.

Cross-examination.

By Mr. Thomas:

Q. Do you remember when this happened, when the seven men came?

A. It was mid-summer, in the month of July some time.

Q. Last year?

A. A year ago last July.

Q. Was the sheriff one of those seven men?

A. There were two sheriffs in this group.

Q. Was the sheriff there when you were handcuffed?
A. Yes.
Q. Did he handcuff you?
A. Yes, I think the sheriff is the one that handcuffed me.
Q. And the time when you were handcuffed, was that in July, too, the same month?
A. That is right.

Mr. Thomas: That is all.

HOWARD W. GORMAN testified as follows:

Direct examination.

By Mr. Oman:

Q. Will you state your name, please?
A. Howard W. Gorman.
Q. Where do you reside, Mr. Gorman?
A. I reside at Kanato, Arizona.
Q. Are you a member of the Navajo tribe?
A. Yes, sir, I am.
Q. Are you a full-blooded Navajo?
A. Yes.
Q. Mr. Gorman, are you acquainted with the range area about which we are concerned in this lawsuit?
A. Yes, sir.
Q. Have you visited that range area?
A. Yes, sir.
[fol. 175] Q. Can you tell us during what period of time?
A. From the first time of the trouble, about the year 1947, I would say; from then on, about three or four times I visited the area.
Q. Can you tell us whether you have ever attended any meetings relating to the use of this range area?
A. Yes, I have.
Q. Have you attended any meetings between white men and the Indians and the Bureau of Land Management officials?
A. Yes, sir, I have.

Q. And has Dale Kinnaman been present at any of those meetings?

A. Yes, sir, he was present.

Q. Will you tell us when you were at the first meeting at which Dale Kinnaman was present, where it was held, and when, as nearly as you can?

A. The first meeting I have had was just kind of a hit and miss meeting at Blanding where I served as interpreter, but there wasn't much said there. The next meeting——

Q. Let's cover the first one first. That was at Blanding?

A. That was at Blanding.

Q. In about what year was that?

A. That was about the year 1947.

Q. Was Sakezzie present at that meeting?

A. Yes, sir.

Q. You know Sakezzie, do you?

A. Yes, sir, I do.

Q. Tell us what if anything was said between Mr. Sakezzie and Mr. Kinnaman.

A. Mr. Kinnaman said to Sakezzie in passing where I had to serve as interpreter, that he was going to put him in jail until the thing is settled—the trouble is settled.

Q. That means the dispute over the range rights?

A. Yes. They were there for that purpose.

Q. Did you attend any other meetings at which Mr. Kinnaman was present?

The Court: You didn't finish that conversation, did you?

By Mr. Oman:

Q. Did Sakezzie give a reply to Mr. Kinnaman?

A. No. Mr. Sakezzie didn't say anything. He just walked away.

Q. What had been the discussion which led up to this statement by Kinnaman?

A. It was the trouble arising out of the land management [fol. 176] area that was set up for the use of white men and Taylor Grazing laws and so forth. That was the question at point.

Q. Was it contended there that Mr. Sakezzie was on this land and had no right to be there?

A. He was on that land, and they contended—the Bureau of Land Management contended he didn't belong there.

Q. Was Mr. Kinnaman in charge of that meeting?

A. Yes.

Q. He was conducting the meeting?

A. He was conducting the meeting.

Q. What is the next meeting——

The Court: Was anything said about the livestock at that meeting?

The Witness: It was more or less a meeting where there was very little said, and it was just that the Navajos couldn't decide why they should move. The Bureau of Land Management—as I took it, Mr. Kinnaman—would say they had to move off. That is the reason why there wasn't much words exchanged. The meeting practically broke up. And it was at the end of this meeting, when it broke up, that they had Sakezzie and Kinnaman exchange words.

The Court: Mr. Kinnaman said he was going to put Mr. Sakezzie in jail. Did he say what he would do to his horses?

The Witness: They didn't say anything about the livestock there. That is all that was said. The only thing he said was, "Then you will have to stay in jail until the thing is settled."

By Mr. Oman:

Q. This was back in 1947?

A. 1947.

Q. Tell us what meeting you next attended.

A. I attended one held at Monticello where the Indian Service were also present, and Mr. Kinnaman was also there.

Q. Was Mr. Kinnaman in charge of that meeting?

A. Yes.

Q. When was that, Mr. Gorman?

A. That was about the year 1949.

Q. Was Sakezzie there?

A. Yes, he was.

Q. And others of these plaintiffs?

A. I remember very well Eddie Nocki and several others [fol. 177] back there. I recognize them; I don't know their

names. There were about twenty-eight Navajos there, as I remember.

Q. What was the discussion at this meeting?

A. The discussion was on land, that the Navajos had so many months to graze on that land management area; I believe seven months they were given to graze there north of the San Juan river and five months south, or within the Ereth, Utah, area, that is the reservation area. At this time they didn't decide anything, either the Navajo claim—Sakezzie and others claimed they belonged in there.

Q. In where?

A. In this area that was in dispute at that time, the same area referred to by Mr. Kinnaman.

Q. Is that the same area with which we are here concerned?

A. Yes, sir.

Q. Did you hear Mr. Sakezzie at that time—did you interpret anything to him, I mean, that Mr. Kinnaman said to Sakezzie?

A. Yes, Mr. Kinnaman said they were going to put eight Navajos in jail, and then these seven were supposed to have been in trespass at that time.

Q. Did he say why—did you understand why he was to put them in jail?

A. They were in trespass; they were running livestock in the area where they didn't belong. But the Navajos contended they belong there from time immemorial.

Q. Was Mr. Sakezzie one of those who Dale said he would put in jail?

A. Yes.

Q. Will you tell us if you ever heard Mr. Sakezzie have any other conversation with Mr. Kinnaman since that date?

A. I don't believe there is any more, just those two times, as I recall.

Q. Did you attend the proceeding here in Salt Lake City when an action was brought here a year or two ago?

A. Yes; I was the interpreter here in court.

Q. Did you see Mr. Kinnaman here at that time?

A. Yes, sir.

Q. Was Sakezzie here at that time?

A. Yes.

Q. Did you hear any statement Mr. Kinnaman made to Sakezzie at that time?

A. No, I didn't. I didn't hear them make any statements to one another.

Mr. Oman: That is all.

[fol. 178] Cross-examination.

By Mr. Thomas:

Q. You didn't hear any statement by Mr. Kinnaman as to why Sakezzie should be put in jail?

A. He was in trespass, on account of being in trespass within this area.

Q. Did Mr. Kinnaman say who was going to put him in jail?

A. No, he didn't. But he said, "We will put you in jail."

Q. "We will put you in jail"?

A. "We will put you in jail".

Mr. Thomas: That is all.

Mr. Thomas: I object to this testimony, if Your Honor please, and ask it be stricken on the ground it is not within the purview of this case.

The Court: Overruled. The motion is denied.

Hosteen Sakezzie testified as follows, the examination being conducted through the medium of the interpreter:

Direct examination.

By Mr. Oman:

Q. Will you state your name?

A. Hosteen Sakezzie.

Q. Where do you live, Sakezzie?

A. Montezuma Creek.

Q. Can you tell us where that is located with reference to Blanding?

A. It is east of Blanding.

Q. Which direction is it from Monticello?

A. To our understanding, Montezuma Creek is the whole valley. So it is located directly east of both those places.

Q. Do you know where Ira Hatch's trading post is located?

A. Yes.

Q. Which direction is your place from the Hatch trading post?

A. On this side of Hatch's store.

Q. You mean west of Hatch's store?

A. It is more the northwest of his place.

Q. How far?

A. It is about a mile, maybe not that far.

Q. Is that inside or outside of the Navajo Indian Reservation?

A. It is outside of it.

Q. Is Hatch's post also outside?

A. Yes.

[fol. 179] Q. How long have you lived in this place, Sakezzie?

A. That is the place I was born. To be exact, my birthplace is about fifteen miles due north of that Hatch store, following the Montezuma Creek.

Q. Now, is the place where you now live and the place where you were born inside of the area with which we are concerned in this lawsuit?

A. Yes.

Q. Do you operate any livestock, Sakezzie?

A. Yes.

Q. For how long have you operated livestock?

A. Just as far back as when we learned to go about it properly; around ten years of age when we started to work livestock.

The Court: How old is he now?

A. It is either sixty-eight or sixty-nine, right around there, or seventy—around there.

By Mr. Oman:

Q. Did your father operate livestock in this area before you, Sakezzie?

A. Yes. That is the way you inherit things. My father

and mother were operating there before. I inherited all this there after they were gone.

Q. How long hav they been dead?

A. They have been gone quite a number of years ago—probably over twenty years ago. My mother was the last one that died. My father died about two years previous to the death of my mother.

Q. What class of livestock have you operated in this area all of these years, Sakezzie?

A. I am operating sheep, goats, cattle, and had some horses. I did operate horses, but they were taken away from me.

Q. You say your horses have been taken away?

A. Yes.

Q. When did that happen?

A. I think it is in the month; the last day of October or first day of this month, some place thereabouts.

Q. Does that mean this year, or some other year?

A. A year ago. Most of these things happened a year ago.

Q. Do you know what happened to them?

A. I don't know. Nobody knows what happened to them.

Q. Sakezzie, do you have a reservoir where you live?

A. Yes, I have.

Q. Is that close to your hogan?

A. Yes, it is close to my home. I use it as a little irriga- [fol. 180] tion project there, because I have a pipe running through the dam.

Q. Who built that reservoir, do you know, Sakezzie?

A. It is a white man that has been doing that kind of work, from Blanding. I don't know what his English name is. He has been working at that kind of work there, and using bulldozers there and working on the dam for me.

Q. Did you employ this man to build this dam for you?

The Court: What difference does that make in this lawsuit? Mr. Kinnaman testified yesterday that he built that dam, that it was a government-owned reservoir.

Mr. Thomas: I believe that is the reservoir he indicated the C.C.C. built.

The Court: Well, go ahead.

By Mr. Oman:

Q. Did you employ this man to build the reservoir for you?

A. I paid this man to have him do the work for me.

Q. Did the government ever do any work on the reservoir in any way?

A. None.

Q. Do you know Dee Black, Sakezzie?

A. Yes.

Q. Have you seen him in this range in which you say you run your livestock?

A. Yes.

Q. How often?

A. It varies. Sometimes he comes down there almost daily. Sometimes we wouldn't see him for a week. Then he comes down again. That is the way we see him down in this area.

Q. Has he contacted you about the time you say your horses disappeared?

A. When my horses was taken it was done during the night. How would anyone watch his horses during the night and see the person that is taking the horses out of his area?

Q. Tell him I mean did Dee Black talk to him within a few days from the time his horses disappeared.

A. I didn't see him, but I saw his track with the cowboy boots. I seen on this point overlooking my place down there where somebody rode around and kind of watched things out from the bluff there. I could see the tracks there. I didn't see the person that was going there.

Q. You say you saw his tracks. Does he mean to say he knows the tracks of this person—whose tracks he saw? [fol. 181] A. We know his foot marks there if we see them. We do know no other white man would come in there, those places there, with the high heeled boots and the kind of horse track marks he made through those areas.

Q. Do we understand you to say your horses were taken at night?

The Court: He said that.

By Mr. Oman:

Q. Sakezzie, what had been your practice in managing your horses? Had you had them in a corral during the day time or any time in the night?

A. Yes, my horses were in the corral during the day, because he may be picking up horses right along through those areas. I put my horses in the corral during the day, and put them out to feed in the night time, when everything gets quiet.

The Court: Find out where they were.

By Mr. Oman:

Q. Where were these horses at that time, Sakezzie? Were they at your home, at your hogan?

A. When I turned my horses out in the evening they would trail off down to southwest of my place down there. There is a hill where the road goes up, kind of a ledge there, kind of bench-like hill there. The horses started to scatter out for feed there, where I seen they were picked up. It was a moonlight night with us, if I recall right, when my horses disappeared.

Q. We asked you where this corral from which you turned them out was. Where is it located?

A. At my own place.

Q. That means where he lives?

A. Yes.

The Court: He knows where they were picked up? Ask him if he knows where they were picked up.

A. Yes. I have to track my horses to find out where they were picked up. I know where they went.

The Court: How far was that from his hogan?

A. I don't think the horses covered a mile distant from my house where I turned them out to where they were picked up.

By Mr. Oman:

Q. How many horses did you turn out that night, Sakezzie?

A. Seventeen head of horses, what I turned out. Sixteen

horses, and I had a burro jack there with this bunch. There [fol. 182] were five picked up prior to this.

Mr. Thomas: Sixteen head of horses and one burro.
Mr. Oman: One burro jack.

A. Prior to that I lost five head. That makes twenty head of horses and two burros I missed.

By Mr. Oman:

Q. How many horses had you kept in the corral?
A. None.
Q. Was this all the horses you owned?
A. That is right. That is all the horses I owned.
Q. Now, Sakezzie, you say you have run livestock in this area. Were you running other classes of livestock at the time these horses disappeared?

The Court: What do you claim for that?
Mr. Oman: I want to show the results to this man from the taking of his horses in his other livestock operations.
The Court: Go ahead.

A. I have sheep, goats and cattle, and the horses I used to operate this livestock with were taken up. I had to borrow horses from my neighbors to go and look after my cattle.
Q. Are horses necessary in the operation of cattle and sheep in this area? Do you need horses?
A. That is right. We have to have horses.
Q. How often do you use these horses in this work?
A. We have to use them almost daily. That is true also for herding sheep and cattle.
Q. What happens to these livestock if you do not have horses?
A. Have to have horses in order to operate this livestock, because there are places where the livestock goes, that they have to cover the country on horseback. And they must have horses, because it is worth a lot of money to us in operating our livestock.
Q. Is it possible for a man on foot to turn cattle—to drive them or to gather them in that area?
A. No.

Q. What happened to your cattle and your sheep after your horses were taken?

A. I am forced to borrow a horse to go to cover the area [fol. 183] where my cattle was. It cost me every time to borrow a horse from someone who has one.

Q. Now, Sakezzie, were you able to borrow a horse in time to take care of your livestock—your sheep and your cattle?

A. It is almost impossible. I have to pay the man that loans me the horse. I have got to have horses of my own to operate my livestock.

Q. Did he get his livestock before they scattered out—his sheep and cattle—was he able to get around them and take care of them before they scattered out?

A. That is almost impossible, because you spook the cattle—scare them off—more than you head them off.

Q. How many people are in your family, Sakezzie?

A. There are about fourteen of us in my family.

Q. Did any of the other members of the family use these horses before you lost them?

A. That is right. Every one of those fourteen of my children are concerned with the horses that has been taken away from us.

The Court: We will take the afternoon recess.

(Recess.)

The Court: Go ahead.

(Last question and answer read by the reporter.)

By Mr. Oman:

Q. What use did these children and other members of your family make of these horses, Sakezzie?

A. We have a lot of uses for those horses. These tame horses the children use, and they use them to go and herd sheep with, and we use them for looking after the cattle. We use them as a team for the wagon. We use them as a team for cultivating land. We use them as a conveyance between places. In case of emergency we go to the nearest place where we could obtain help. And we use them to go about amongst ourselves, in our social affairs. And if need

be, we would also eat horses. So we have a lot of use for our horses in respect to our lives.

The Court: You gather pine nuts, too, don't you?

The Witness: That is right. Because these horses we lost are all broken horses. They are broken, gentled, to be usable amongst children and older people and among all [fol. 184] of us. They use them to go out into the woods to gather nuts.

By Mr. Oman:

Q. How old is a child before he begins to use a horse?

A. Any time from five years up we learn our children to ride.

Q. Do the old people, many old people, also use these horses and burros?

A. That is right. Mostly they use burros more than the horses for the older people.

Q. Why is that?

A. A burro would be tamed so gentle you could put a lot of things—especially your cane, if you had it you could have it across your front when you have a burro. That is for old people, walking cane.

Q. Are burros more gentle than a horse?

A. That is right.

Q. Do your old people ride these horses on throughout their life?

A. That is right. When they die they have to kill their horse, too, with their burial.

Q. When an old person dies you kill his horse, you say?

A. That is right.

Q. What do you do with the horse?

A. We just kill it, assuming the horse went along with the deceased to the Great Beyond.

Q. You mean you still follow that custom?

A. That is right. That is the way our belief is.

Q. Will you tell us, then, what happens if you do not have a horse to kill when old people die?

A. Our religion runs this way: When we go into the Great Beyond, the next life, horses are used over there, and that is why the best horse a person owns is killed when he dies. And they use those horses in the life hereafter,

where they could go about with it in that life. And when a man is not mounted—there is a place where they all see from the other side, where all the persons come into this next life, and if a man is not mounted, if he didn't own any horse, he will be looked upon—he will not equal those other people that come into this life hereafter mounted on a good horse. That is the reason why any Indian when he dies should be mounted, and should be mounted on the best horse that he owns during his life period.

[fol. 185] The Court: Your theory about this line of testimony, Mr. Oman, as I understand it, is that if the Bureau of Land Management agents can drive away or destroy all the Indians' horses, necessarily the Indians are driven away, too?

Mr. Oman: Yes, Your Honor. And these people suffered greatly mentally. They are a people who are different than Christians. And I think it is something the Court ought to understand. They are hurt in that way far different than the taking of our horses or any of our property. He took me into a line there I didn't quite expect, by misunderstanding my question. But I did want to bring that out. I want to pursue this.

The Court: Well, go ahead. To finish my thought about that, your notion is, if your Land Management agents down there knew this, they killed the horses in order to get rid of the Indians?

Mr. Oman: Yes, Your Honor. And it was a wilful and malicious act, wantonness; goes so far as the mental anguish and suffering which has resulted to these people as an element in this case.

The Court: All right. Go ahead.

By Mr. Oman:

Q. I understand that you kill the best horse a man owns when he dies on the theory that he needs the best mount in the next world in order to be looked upon favorably there among his people with whom he there continues in existence; is that right?

A. Yes, sir.

Q. Then is it a man's purpose in this life to secure and to own the very best horse he can possibly acquire and to

have that on hand at the time he dies, so he may take it with him into the spirit world?

Mr. Thomas: I object to that as being not within the purview of this case.

The Court: Overruled.

A. That is right.

By Mr. Oman:

Q. What effect, Sakezzie, if any, has the taking of your horses had upon your children?

Mr. Thomas: I object to that also, if Your Honor please, as not within the purview of this case.

[fol. 186] The Court: Overruled.

A. I stated before that I openly weeped, because I know that my horses were then taken never returned to me for possession, and in view of that, my children did the same. It seems like one of my children, or two of us, were being killed off unexpectedly. That is the way we thought of this thing, after we found out that the horses were being picked up and driven away from us.

Q. You mean you compare a horse in value to the value of a child?

A. That is right. That is the way that we think of our horses. We extended care to our child; we also extended the same loving care to the horse we own. When we go out in the morning we see to it at the noon hours that he gets his share of the feed while we also eat our lunch, and then we go out and go about our work, and always thinking that when we do eat we see to it that our horse also gets his share of the feed that he is entitled to.

Q. But you suggested, in an answer a moment ago, that a horse to you was somewhat near the value of a child——

The Court: Well, I think he has covered that. I don't mean to cut you off, Mr. Oman, if you claim anything.

Mr. Oman: I wanted to clarify that point by pointing out the Indian religion and the comparative value he places upon his horse or any other possession he has in this life.

The Court: Go ahead.

By Mr. Oman:

Q. I want you, Mr. Sakezzie, to try to make this plain to us, if you consider a horse almost as valuable as you do a child or a human life.

A. In view of our livestock operation we almost have to have horses to go about to do everything that we wanted to do with a horse in the Navajo land. And that is the life in the Navajo land. And if there is any other things we could acquire to go about as we do with horses, of course it is a car, but the car is not like a horse. It will go as long as it is not broken down, while a horse wouldn't—a horse can almost take care of itself, and will continue as long as some care is considered in feeding the horse, and the care he is entitled to. The result would be fatal to you in whatever undertaking you may have for a horse.

[fol. 187] Q. You say you used these horses to bring wood to the hogan—to the camp?

A. Yes.

Q. How far do you have to carry this wood to bring it to the hogan?

A. At the very best, we have to go about five miles into the mountains to get our firewood—anywhere from five miles up to seven, eight, ten, and so on. That is when we had the horses as a team to use on our wagon. Now, since we don't have any horses, we can't even get that wood.

Q. Is there any other kind of fuel in that country that you can use for your fires?

A. We are using the greasewood, Chinese brushwood, we use at the present time, which we do go out and gather with our arms.

Q. Is there any coal or any other kind of fuel except wood which you use in this country?

A. No, there is no coal in the places where we live, so the only fuel we have is wood.

Q. Now, tell us what you have done since you lost these horses about getting wood—how you get it, how far you have to go for it, and what kind you get.

A. We haven't had any wood for fuel since our horses were taken. I say that the only fuel we are using are these greasewood brush and Chinese brush that are found locally in the place we reside.

Q. How do you get them to the hogan?

A. We carry it on our back, or we could get it in our arms.

Q. Has that enforced an extra burden upon the family?

The Court: We will take judicial notice of that.

By Mr. Oman:

Q. What about water, Sakezzie? Did you use these horses in bringing water to the camp?

A. We have to use it. We had to get water in these little barrels, what we can carry on our back, or what we can carry with our arms.

Q. Did you use these horses, when you had them, in getting the water?

A. That is right. We used to use horses for hauling water.

The Court: How far did you have to bring the water?

The Witness: It varies, because we have to move around with our sheep. Sometimes we have to get away from the [fol. 188] water holes five or six or seven miles where we could get our drinking water.

By Mr. Oman:

Q. How often do you have to make these trips to bring water to your camps and hogans, Sakezzie?

A. Within a week's time he has to make a trip to get domestic water for the camp.

Q. How about for the hogan where the family resides?

A. That is true of where the families live, too. We do have shallow wells, but when it gets hot in the summer time it goes off, and we just have to go farther away to get water.

Q. How often do you have to make trips when you carry this water to the hogan? Every day?

A. I personally don't have to go not too far to get my domestic water, on account of this dam I have reference to, and the shallow well that I have. But because of the operation of my livestock I have to go places with my livestock—I have to go quite a ways from these watering places. Then I have to use a team and barrel to haul water to these sheep camps.

Q. Do you ever carry water on your horses and burros?

A. That is right. We had these five or ten gallon milk cans on each side of a burro to haul our water with to the sheep camp.

Q. Now, do we understand you have to carry all that water on your back or in your hands?

A. That is right.

Q. You mentioned you used these horses to gather pine nuts, Sakezzie. Is that an important use to your family?

A. That is right.

Q. How far do you go to gather these pine nuts? And who does the pine nut gathering?

A. It all depends where the pinon crop is located. Sometimes, if it is towards the areas where we are living, it would be about twelve to fifteen miles. But it does not come every year. There are times when we have to go great distances to the place where the pinon crop is on, where people go over there to gather them.

Q. Ask him what he means by "a great distance."

A. I mean this great distance, anywhere from fifteen miles on up. On account of the places where you can't go there with cars or anything, you have to go there with horses—horseback—to get to the pinon field.

[fol. 189] Q. Did he go as far as forty or fifty or seventy-five miles?

A. That is correct. He even go from Montezuma Creek into that Black Mountain country in Arizona, close to Tuber City on the west side. That is almost one hundred miles.

Q. When they go to gather pine nuts do all the family go, and go on horses to the pine nut fields?

A. Yes.

Q. That means the children and the old people?

A. Yes.

Q. What use do you make of these pine nuts?

A. We eat them, and we sell them to the stores, trading stores.

Q. Is that an important source of income to you, Sakezzie?

A. That is right.

Q. Is it also an important source of food for the family?

A. That is right.

Q. Now, do we understand since the horses were taken away you are able still to go and gather these nuts?

A. No, we can't go like we used to, because we don't have the horses that we had to go about these places. The only way we can get out of this area is on this graded road where the car goes.

Q. Can you tell us about how many pounds of nuts you gather in a season?

A. That varies much upon the pinon crop. If it is a heavy crop in a year, it doesn't take very long to pick up one hundred pounds. But if it is scattered, and you have to pick up everything, it takes much longer. And it varies as to how much the crop is on the ground.

Q. Can he give us an average through the years how many sacks of pine nuts he gathers?

A. He says if there is a big crop it don't take long to fill up these fifty-pound flour sacks.

Q. How many of those does he fill up in a year?

A. I think they could easily pick up ten one-hundred pound sacks to twenty sacks in a month.

Mr. Thomas: Ten to twenty one-hundred-pound sacks?

The Witness: Yes.

By Mr. Oman:

Q. Did he gather that many when the nut season is good?

A. That is right. It all depends how good the crop is.

The Court: Well, now, what I would like to know before [fol. 190] we leave this subject is—you ask him this for me—you see, he says they use these pine nuts for food, and he says they use them also to sell to get money—this is one of the cash crops. You understand what a cash crop is?

The Interpreter: Yes.

The Court: What I would like to know is about how much cash the pine nuts produce for the people that are involved in this lawsuit, every fall when they gather the pine nuts, how much cash do they get for those—and I mean all the people in this lawsuit, which he knows, or as many as he knows.

A. I think there is a lot of money that these people realize, because it all depends what the market price is for these

pinons. If the price is high, they naturally would realize much more money than when the price is not too good.

The Court: Can he tell me how much cash he got out of the pinon crop the last fall he has his horses and they had a good crop—how much money did he get for his pine nuts?

A. We don't realize a pinon crop every consecutive year.

The Court: Not every year?

A. There are times it goes two years, three years, sometimes five years in between. So we don't really know just what. But when we do get a crop, and pick it up, we realize quite a considerable item to our livelihood. But since this last four or five years of drouth period we didn't realize anything—not only the pinions, but all the vegetation cover of the range. We didn't have any growth of anything at all.

The Court: We are going to recess now until tomorrow morning. I think we will start a little earlier in the morning. Would it be satisfactory with you folks if we start at nine-thirty?

Mr. Oman: Yes, Your Honor.

[fol. 191] The Court: We will recess until tomorrow morning at nine-thirty.

(At this point the further hearing of said cause was continued to Thursday, November 19, 1953, at 9:30 o'clock a. m.)

Salt Lake City, Utah, Thursday, November 19, 1953, 9:30 a. m.

(Pursuant to recess, the further hearing of said cause was resumed, and the following proceedings were had.)

HOSTEEN SAKEZZIE thereupon resumed the stand for further examination and testified as follows:

Direct examination (resumed).

By Mr. Oman:

Q. Sakezzie, have you used these horses to procure deer and elk?

A. That is right. We have used those horses to hunt deer, antelope and rabbits and some other game that we could find in our country.

Q. Are you able to do this hunting without horses?

A. No.

Q. How many deer each year have you been procuring for your family?

A. Whatever the game department allows him to get.

Q. How many in his family are able to get licenses to hunt?

A. Just as many as of those in my family obtain a hunting license. Sometimes the game department allows them two deer to each license.

Q. Can you tell us, please, how many in your family hunt deer?

A. There will be five members besides himself; that makes six of us.

Q. Do you hunters usually get a deer each, each year?

A. That is right.

Q. And you use all of this meat to feed your family, is that right?

A. That is right.

Q. Now, you mentioned yesterday that you used these horses to cultivate a little field that you have, is that right?

A. Yes.

Q. Are you able to cultivate those fields without these horses?

A. That is some of the trouble we are experiencing now, [fol. 192] that we can't cultivate our land without the use of horses.

Q. What do you raise in these fields, Sakezzie?

A. It varies from season to season. Some years we don't get enough moisture. In those years we don't plant

too many varieties, but we have planted corn, squash, watermelons, muskmelons and beans. But that does not say that I raise those every year. It all depends upon the precipitation and the moisture that is adaptable to those seeds.

Q. What is your main crop?

A. Corn seems to be, the crab-resistent seed that I plant that would always produce a crop each year.

Q. Do your people use this corn as food for the family?

A. That is true.

Q. And do you use all of the things, whenever you plant them, as food for your family?

A. That is right. We don't waste anything.

Q. Now, Sakezzie, what use have you made, if any, of these horses in your recreation?

A. We use these horses for other purposes, too, social gatherings; when they put on big rodeos we go over there with our horses and the Indians in the Navajo land put up a big ceremony for the reservation. We naturally want to attend those, so we go over there.

Q. Are those horses not necessary in getting to those ceremonies and other functions?

A. No.

Q. Beg pardon?

A. No, they have to have horses to go to these places.

Q. They do have to have them?

A. That is right.

Q. How far do they have to travel in getting to these ceremonies and functions?

A. Sometimes we probably might be drifted into an area in the Black Mountain country when we attend one of those ceremonies. It might be there would be another one going on at another part of the country—we go from one to the other. It will take days for us to attend all these.

Q. When you go to those ceremonies does the entire family go—the children and the old people as well as the young people?

A. That is correct.

Q. Sakezzie, have the numbers of livestock you operate been reduced in the last two years since you lost these horses?

A. That is right. My livestock holding is going down

[fol. 193] from year to year. That is almost natural, I guess, to any livestock operator, but it varies, too, you know, when the country is hit by drought or a big snowstorm there is a tendency of natural reduction there. But that doesn't come to be pretty frequently.

That is why it is very necessary that we accustom our livestock in such a way that they could withstand all these hardships. In other words, these animals that are hardened to this kind of conditions that exist in our home land could survive in those bad times.

Q. How many sheep were you running before your horses were taken away?

A. I had almost close to the number of a thousand head before they started.

Q. How many does he have now?

A. I have only 170 head of sheep, and also around about 150 goats; that is the total number of my sheep at the present time.

Q. Now, does this reduction in your sheep numbers have anything to do with losing your horses?

A. Yes, sir.

The Court: Have him explain that.

A. What I wanted to impress here is that every fall we now have to sell the lambs out of any herd that a Navajo owns. That is one of the normal reductions in the number of sheep.

By Mr. Oman:

Q. He said he had reduced his sheep because he had lost his horses. Will you tell us why that was necessary, to make any reduction in his sheep because he had lost his horses?

A. It is very difficult to go about and operate your livestock on foot, especially if you have some cattle, or have sheep, for that matter—you can't go out herding sheep three or four days in succession on foot, in the type of country we are living. And we almost have to have a horse in order to go about this inaccessible kind of country that we live on.

Q. Now, Sakezzie, are you acquainted with all of the plaintiffs in this action?

A. Yes.

Q. Do you all live together in the same range area?

A. Yes.

Q. And do you know the livestock that each of the other plaintiffs operate?

A. That is right. They go on the same range. It is an open range.

[fol. 194] Q. Do you know whether these other plaintiffs also lost horses about the time you lost yours?

A. That is right.

Q. Can you tell us how many horses and how many burros were lost by all of the plaintiffs altogether?

A. We have lost quite a number of our horses through that area. We don't know exactly just how many. But we have been missing horses right along. And what we actually account for is that we have lost thirty-five head of burros which were picked up in Montezuma Creek above Hatch's store some place, where the Indians had a little farming area there—little patches of ground they have there. These burros came down to those places to pick up the corn stalks, where they were picked up.

The number of horses is over 115 head, and the total is 150 head of animals we lost out of this area. But there are times, too—on the Colorado State Line they have a corral, too; they pick up a number of horses on that side, too; in that area one or two Indians had redeemed their horses. I think one of the persons is here present, that redeemed his horse on that side of the area that is in dispute.

We seen them hauling horses through, by the store of Mr. Hatch there. We seen the horses, with blood all over them, in the truck. When we see them, these people that were hauling the horses was from that area.

Q. Was Dee Black one of the persons hauling the horses away?

A. That is correct. Dee Black is one of them. Another one is Leland Redd. They almost go in pairs for taking these horses out by truck.

Q. You say they "almost" go in pairs?

A. That is right.

Q. Now, Sakezzie, were there any horses left to these plaintiffs after the number was taken about which you have just told us?

A. I don't think there is any horses left, that is, to my knowledge, because these horses were born and reared there in this area, and we were asked to bring them across the line into the reservation, and just as soon as the owner may go some other place for selling his horses, they go back to the place where they was raised. That is the way that no real accurate account is made just how many horses were picked up that have been drifted back into this disputed area.

[fol. 195] Q. Do you know whether the plaintiffs own any horses, since these were taken?

A. Some of those people that came in from over the line from the reservation side, they came to the store mounted. They probably may have some horses on that side. But those of us who live on this disputed area, we don't have any horses left.

Q. Now, Sakezzie, I guess you have met with these plaintiffs and talked about this loss of your horses during the last year or so?

A. That is right. They almost have to talk about it, because that is the life of the Navajos, that they have lost horses. And it keeps them feeling whereby they lose their sleep and fear what will happen to them next. That is the talk down in the area.

Q. What is the fear that might happen to them next?

A. These people that comes into our area to haul away horses from them are pretty well armed to do their work, and we are afraid. When a man comes in your area with guns, naturally he would be afraid of that person.

Q. What do you fear?

A. I think it is their intention if there is any violent act on our part, I think they are ready to shoot. I think it is the very intention why they are well prepared to come into our area.

Q. What has this done in your family, Sakezzie? Do your children feel this fear?

A. Well, there is fear in my family. They lose their

sleep. They wonder what will be the next step these men are going to do to them.

Q. Have you done anything to protect your family from what you have feared and expressed to us?

A. One thing I know of, I like to bring this to the proper authorities' attention, that we are so afraid of these men, the way they deal with us, and if anything should be done to relieve this tense feeling among my people. That is the only avenue that is open to me, to contact the right authorities to relieve this fear feeling among my people in that way.

Q. Are your children afraid to remain in the hogan at night so you put them out where you think they may be safer?

A. That is correct.

Q. Where have you sent them to sleep?

A. We usually go up among the rocks some place, or away from home there, where they sleep during the night.

Q. What about the women? Do they do the same thing?

A. They, also.

[fol. 196] Q. Are the children and the women fearful to go out to take care of the livestock as they did before these horses were killed?

A. That is correct. They are afraid to go about their daily affairs.

Q. What effect has this had upon you, Sakezzie?

A. I am afraid, too—just like the rest of the members of my family.

Q. Is there any way for you, Sakezzie, to continue to get this food about which you have talked, without these horses?

A. I can't continue to live without the use of horses. I have to go to trade in stores to get what is necessary to get from trading posts to take on horseback to my family. I must have a horse to do that.

Q. Is that true also with all of these other plaintiffs?

A. Yes.

Q. Sakezzie, do you people have any fields where you raise any hay to feed your horses, or any other kind of feed for your horses?

A. We don't raise any hay, because we are living in a

type of country that is arid. There is no place where we could get the water to raise those kind of crops.

Q. You don't have any irrigation in that country?

A. Could be some irrigation project developed in there, but there is just the small operators; they have small, little set-up like that. But we don't have enough rain there to store enough water there to continue our farming from year to year whereby you could raise necessary crops.

Q. Then these horses which you have owned have procured their food—just the natural food that grows on the range, is that right?

A. That is correct.

Mr. Oman: I believe that is all.

The Court: There is one matter you haven't pursued enough to suit me. There is some testimony here that these men's horses were taken in the night-time. Now, there is also some testimony here that in the ways of the Indians they identified the horses' footmarks and the boot marks of Dee Black, the government agent down there, upon a bluff. I wish that you would let Sakezzie, in his own way, tell us all about the loss of those horses—his horses.

He has a story to tell us about that. I want him to tell it [fol. 197] in his own way, all about it—what happened that night, what they found the next day, what he saw, what he heard, what he observed. Just have him tell his own story about that, and take his time. We have all the time you need.

A. Personally I and my wife and others went to the big ceremony gathering over in the Tualena area, that is about forty to fifty miles south of Shiprock, on the mountain range.

They had a big white tent there. We went over there. We returned back on the same day that these horses were being picked up. We had a visitor there from Monument Canyon, a family named Billy that came over there to visit us. They were there when we returned.

During the day my family had these horses in the corn stalk patch, one of the corn fields there close to my home there. We were afraid if we had our horses out during the day they would be surely picked up, so my family had them

in this corn patch all day. And in the evening we turned our horses out to graze on the range. And this Dee Black, who is the range rider in there, we saw on the bluff overlooking our place there, where we seen his horse tracks and boot tracks. I think he was watching all the time what we were going to do with the horses.

And he knew that evening that my children turn out the horses onto the range, and this is not very far from the place that we live in the valley. These horses were going west from our place where they will be on the road between Hatch's store and Blanding, and there is quite a little hill there—kind of bench-like hill—and the horses that were leading the band, some were on top of the hill already, some were still on this bench, and some still in the valley. That is the way the tracks showed.

It was moonlight that night, and it is a custom among us Navajo people at break of day one of the boys is trained to go and gather in the horses for the day for whatever activities they were to engage in during the day—he should have the horses ready there when the sun is up. So one of the boys went to bring in the horses the next morning. He found out that the horses were picked up on top of the hill there. He see the car track where a horse was unloaded from a pick-up. It must have been two men, otherwise he [fol.198] can't ride and drive the horses and drive the pick-up at the same time.

So this rider, when he get on the horses, he don't have to go all over the country for them, following each other. But that is the way, the lay of the land. Some were still in the valley, some were still climbing, some on top. He gathered them along the road and started to drive them up. He drove some distance where it is a kind of community corral there which belongs to stock people, where they gather up horses or sheep. In fact, they use it for a shearing corral there some years. The road leads up—it is an old wagon trail—to Blanding—more or less a shortcut to that place.

Instead of following the main raised road, he started on this old wagon road to Blanding. The boy, when he found out the horses were being picked up, he returned home. My boys, they started out—happened to be one lady in this bunch that went to see about it. They followed this old

wagon road. A car could go over it, but not with any amount of speed. And they came to Blanding about sun-up, and these boys were loading the horses already, except four still in the corral. They hadn't put them in the truck yet.

And when these boys knew those boys came up, four or five of them in a pick-up, then when these Indians came over to this corral where they were loading the horses, one of the men from there went into town, and he came there with some other men that had guns there. And when this man returned with some other men with guns, naturally the woman, the girl that was with this bunch there, she forced these men to go see if they couldn't do any good, because these men were already with arms, and they thought it was useless to stay here. So they started back again. They were afraid of these men, to contact them further with regard to these horses.

The Court: Was Dee Black there?

A. He was the man with the big whip that was loading the horses there, rawhide whip. The only thing they found out from these men was that these horses were being loaded to take them to Montezuma. We just wondered what they meant to do by having those guns there on the place. [fol. 199] Maybe stole these horses in the night to justify their actions in arming themselves at the time they were loading the horses. We wondered what their intention was all the time.

We couldn't pursue any further, because we couldn't get the proper answer that we would want. So the lady got there, so she asked these young men to return home. That is as far as they went in pursuing after their horses.

By Mr. Oman:

Q. You said Montezuma—that they were loading the horses to take them to Montezuma. Ask him if that could be a mistake. Did he mean Monticello?

The Interpreter: That is my mistake. Monticello. Monticello is the next town.

Q. Ask him if he sent someone to follow up on these horses to inquire of Mr. Kinnaman in Monticello about letting him have his horses back?

A. As I said, we were afraid to pursue our horses further. A few days after this happened one of the men that is here present went over there to see if he could find in Monticello where these horses might be penned. He did look around the places around there, and never located them.

Q. Did any of these horses that were taken from any of these places ever come back to this range?

A. Not one.

Mr. Oman: That is all.

Cross-examination.

By Mr. Thomas:

Q. Mr. Sakezzie, were these horses branded and the brands recorded?

A. That is right. It was recorded brand with the state of Utah. The horses, of course, carries the brand of each individual, each individual owner. Not all of the horses bears his brand.

Q. Are you sure these brands were recorded?

The Court: He said they were. No need of repeating that.

By Mr. Thomas:

Q. Do you know the boys' names who saw these horses in Blanding?

Mr. Oman: He is here now. We will produce him.

The Court: You can stipulate the name.

[fol. 200] Mr. Oman: Tom Jones and Sam Kee and Bill Sakezzie.

Mr. Thomas: You will put them on?

Mr. Oman. We will put them on.

By Mr. Thomas:

Q. Do you have a home on the reservation?

A. No, all my home area is in this disputed area.

The Court: Lived there all his life.

Interpreter: In fact, he lives farther up this way.

The Court: What is that?

Interpreter: In fact, he lives much farther up this way, where the land is in dispute.

The Court: I want to ask him. I will wait until you are through, Mr. Thomas.

By Mr Thomas:

Q. Do you know whether the other plaintiffs live on the reservation, Sakezzie?

A. Yes, after they were forced to move back to the reservation, or course.

Q. Do you know when that was, Sakezzie?

A. A year ago.

Q. Is it not true that you have a piece of farming land on the reservation, Sakezzie?

The Interpreter: I don't think he quite understood your question.

Q. Is it not true that you have a piece of farming land on the reservation which you still use?

The Court: What he is talking about, do you know what the Indian allotment is down there on the reservation? Has he got any of that land allotted to him?

A. No, all his land holding is on this side of the reservation, if that is what you meant.

By Mr. Thomas:

Q. Did you live at one time on the reservation, Sakezzie?

A. How would I live on the reservation if I state already I was born in this disputed area and have stayed—I have lived all my life there?

Q. The answer is no, then?

The Court: You don't need to pursue that.

[fol. 201] Mr. Thomas: I won't. I just wanted to know——

The Court: He has answered your question. We have enough trouble getting this through an interpreter without repeating it. I understand your difficulty. We are all having the same difficulty.

Mr. Thomas: I believe that is all, if your Honor please.

The Court: I would like to talk to you a little bit.

Examination.

By the Court.

Q. Your father lived on the same place before you?

A. In fact, they live all through that area up to this mountain, what the Indians call the Barriers.

Q. Have him tell me this. Did his father live there all during his father's lifetime? Was his father born there?

A. My father was born around what he call the Barrier. That is that mountain west of Monticello mountain there.

Q. In the same general vicinity?

A. That is right.

Q. And it is not on the reservation?

A. That is right.

Q. Now, did his grandfather live there?

A. They were in this area, probably around Spanish Junction country, along that range there, the Moab country, back in there. That is what his grandfather told him. That is before the white man came.

Q. Of course what he knows about this is the general talk in the family and in the tribe, and all of that talk has been that his ancestors have lived there since before the white man, is that right?

A. That is correct.

Q. And that, I want to be sure about it, includes the area in question now?

A. That is one of the areas.

Q. He told me yesterday he was about seventy years old. Can he fix that any closer than that?

A. Indians don't have a written language, and that makes it very difficult to say exactly how old we are. I say yesterday it must be—that I am pretty sure I am all of sixty-nine years of age, and since we don't have any calendar, for months, excepting the years, we could state our time in years.

It is very difficult for an Indian to present exact dates, except certain season of the year, of course. But it is very [fol. 202] difficult. And the thing is, we are contacting a people that are versed in a written language, by a set of rules and laws I suppose that govern their affairs; where we don't. And it is very difficult. And I see no reason why these people that came down and handcuffed our lady folks

should not have an interpreter, like what I am experiencing here at this moment, so it is clear to both sides of us. Why didn't they do it that way, have an interpreter and try to explain what the object of certain things were to be, and how it would be worked about to bring a result?

I think it would have been pleasant work for all of us that is concerned in this area. But the way they do is, they come down and take things in their own hands. We just couldn't understand it, because we have been treated differently before that.

Q. Well, now, is this a tribe, a little tribe in there, or what do you call it? What do they call the set-up here? Are they part of the Navajo nation?

The Interpreter: They are part of the Navajo nation.
The Court: Well, you ask him. He is the witness.

A. It is not a land that has been drifted from the Navajo tribe. It is a land they always have lived in. In fact, they have lived here before the coming of the white man. And the only people that they contact of different language was the Ute Indians.

They have to go to war three different times with the Ute tribe up around the Moab country in there. Finally they went to battle with them, three different times. At that time they didn't have guns, like they do now. They used to have bows and arrows, and they have spears. They have a little thing, they call it a shield, that they protect themselves. I guess it is kind of like child's play compared with this modern war that we hear about.

The last time the Utes tried to drive them off, driving them across the San Juan river, was down the lower end some place close to Lee's Ferry bridge—about there some place. At that time the Ute people were pursuing them. They were driven across the San Juan river down there. [fol. 203] They were chasing them with all the possessions they had. In fact, they had sheep there they were driving along with them.

They couldn't carry the sheep across the river on their backs, so they pick up the lambs. It only took ten days to have these lambs die of starvation because their mothers were taken away by the Utes.

Q. Is there a chief of this little group we are concerned with here?

A. I think this was during the period when the government was pursuing after the Navajos. In fact, the Utes got these guns, loaded with gunpowder and caps—the type of gun was like that. I can faintly remember the type of gun they used.

Q. Describe the type of gun they used at that time.

A. He says you load it with gunpowder, then you put a cap on, and then you work a little thing there, then it explodes.

Q. It is that long ago?

A. It is that long ago. He says that is what my people was afraid of, so they went for more safety there. The Utes got these from the government, from the white man; that is where they got the best of the Navajos at that period.

Q. What I am trying to find out—maybe if I explain this to you, you can explain it to the witness. You know for a long time this part of the country we are concerned with here was owned by Mexico. You know that, don't you?

The Interpreter: Yes, sir.

The Court: Then the United States had a war with Mexico, and out of that there was a treaty—we call it the Treaty of Guadaloupe-Hidalgo. Did you ever hear of that treaty?

The Interpreter: Yes.

The Court: After that treaty the United States owned this land down there. But of course there were a lot of Navajos in that area, so the United States government entered into a treaty with the Navajo people, and the result was there was a reservation set up, that is, a new reservation, down in Arizona and New Mexico. I guess you know all about that, don't you?

The Interpreter: Yes, sir.

[fol. 204] The Court: How far did you go through school?

The Interpreter: Up to the sixth elementary grade.

The Court: You seem to be a pretty well educated Ute. You have heard about the things I am talking to you about now, have you?

The Interpreter: Yes, sir.

The Court: Now, at the time the United States set up the reservation down there in Arizona and New Mexico, the

Indians and the United States entered into a treaty. You know about those Navajo tribes—I understand it wasn't one tribe, but various tribes— that is correct, is it not?

The Interpreter: Different chiefs, different leaders.

The Court: When the United States set up the reservation down there, they did it by the agreement that was entered into between the government on one side and these leaders of the various groups down in Arizona and New Mexico.

Now, what I would like to find out is whether the leaders of these people—going back to that time—of course that is before Sakezzie here—before his time a while, but it would probably be in the lifetime of his father, and certainly in the lifetime of his grandfather.

Now, what I would like to find out is what the old people in the tribe understood, and what the talk was among these people in the vicinity we are troubled about here, up there north of the San Juan river and in and around the Montezuma Creek area—what did the old people say about their—did their leaders go down and enter into a treaty with the United States that set up the reservation?

A. I think this band that has always lived in this area and also in the areas that is in dispute, is a portion of the tribe that went over to that Rondo Basque gathering. They never entered any agreement with the government of the United States.

The Court: I don't know how to spell that.

The Interprefer: R-o-n-d-o B-o-s-q-u-e.

[fol. 205] The Court: That is a very important event in this matter.

Q. Go ahead and tell me what else he said about that.

A. He says it is true he knew a portion of the tribe were taken over to this place, where they entered an agreement with the United States government, but his people, his great-uncle, a man by the name of "The Man That Has a Lot of Arrows", he was the chief in this area that has dealt with those Ute Indians, and their place of safety was to follow this San Juan river to a point around the Navajo mountain area where they knew of a place, an inaccessible place, where they always found safety; it was the place where they went when the pursuit after them was so hot, they drifted down in here. When everything got peaceful again, they drifted back in there.

Q. Is what he said what the old people in the tribe talked about?

You see, what I have to do is ask you about some things that are important from the legal point of view. And I would like to know whether that was the common understanding and conversation that came down. You don't have a written language, so you pass along word about these things, the history of the little group, by word of mouth. I would like to know if that was the conversation, the talk among the older people down through the years, that he has understood. That is to say, what I am asking you about is whether this little group which was separated, whether they had got into any deal with the United States at this Rondo Bosque that you talk about.

A. That is right. In so far as this band in here, it never made any agreement with the United States government like the rest of the tribes at this Rondo Bosque Treaty meeting.

The Court: I have a book I have been reading about that. I will get the right name. We haven't quite got it.

Mr. Thomas: I was wondering if that was the place——

The Court: I think it is the place. There was a good deal of trouble down there after the Treaty of Guadaloupe-Hidalgo. There were some massacres of Indians—a dreadful situation. It all terminated ultimately in the government setting up that reservation.

[fol. 206] These boys understood what that is about. I am somewhat familiar with the names of the events. It was a great turning-point in their history.

As a matter of fact, at that time and following there was a great decline in culture, the arts and crafts, the blankets and jewelry and the things we associate with the Navajo people. They lost a good deal of the aptitude and the art for those things. It was a bad time for those people. It is perhaps the most important event in the history of those people since we took over the territory covered by the Treaty of Guadaloupe-Hidalgo referred to in all of the books about the reservation and the people down there. I haven't got the exact name, but I will get it.

Now, the thing I want to be sure of is that this has always been the talk and the understanding of the old people.

A. Yes, sir.

The Court: Who is the oldest living person in this group?

A. There is an old man, much older than he, down in this area. They call him White Horse.

The Court: Who is the oldest one?

A. Another one is a man still living called Tomas.

The Court: Where does he live?

A. He lives close to Montezuma Creek or one of those creeks there.

The Court: Who is the oldest one—is that Tomas?

A. Yes, I think he is the oldest of those two.

The Court: I want the oldest persons in that vicinity. I want the names, because we are going to have their testimony taken.

A. He is blind and hard of hearing. That will be the difficulty.

The Court: I knew we are going to have to get around some of those difficulties.

A. He knows more about this country than I dare to relate at this moment.

The Court: Tomas?

A. Yes, he is one of the two.

The Court: What is the name of the other one?

A. White Horse.

The Court: And he lives in the Montezuma Creek area?

[fol. 207] A. White Horse lives right along the San Juan river there where Montezuma Creek joins the San Juan.

The Court: Now, then, Mr. Patterson—Knox Patterson represented these boys in the former proceeding here—that was a couple of years ago. Now Mr. Patterson told me there was a very old woman down there whose testimony he wanted to take. Mr. Patterson has since died, so we can not find out about that from him. Will you ask the witness who is the old woman, if he knows, that Mr. Patterson talked

about? I suppose you, Sakezzie, and Patterson talked about it?

A. This old lady lives almost close to the place where I am living at the present time.

The Court: What is her name?

Mr. Oman: Caroline Rift.

The Court: How old is she?

A. She must be all of eighty years of age—pretty old lady.

Mr. Oman: We intended to have her here, but she was unable to travel in a cold truck.

The Court: What I am doing is laying a little foundation here of information so if it seems desirable we can have some depositions taken down there on the reservation.

I don't think we are ever going to solve this thing until we go into this question that I am pursuing now. And I have two or three other things in mind, too. You tell Sakezzie we are going to try to solve this problem—going to try to get the answer to it.

All right, we will take a short recess. Then I want to talk to you some more.

The Court: Do you have any further examination of this witness?

Mr. Thomas: No, sir.

Redirect examination.

By Mr. Oman:

Q. Sakezzie, do you know how many stallions and how many jacks were among the horses which were killed?

[fol. 208] Mr. Thomas: Before he answers, if Your Honor please, I object to that question. There has been no testimony that any horses were killed. He has testified the horses were lost.

The Court: There is all kinds of testimony that horses were killed. As a matter of fact, these witnesses testified they hauled the horses off and killed some of them down there, killed some of them while hauling them in the truck, sold the rest of them to the glue factory in Springville—the by-products factory.

What do you mean, there is no testimony.

Mr. Thomas: I mean by this witness.

The Court: It doesn't make any difference whether it is by this witness. Objection overruled.

A. I think there were four stallions and one jack in this lot that were taken out there.

The Court: Is he talking about his own that were taken?

A. One stallion was his own, and one jack was his own. But there were three other stallions he knows of, of different people that are involved in this case.

By Mr. Oman:

Q. One jack of his own?
A. That is right.
Q. Were these broke horses, Sakezzie, if you know?
A. They were all gentle, broke horses.

The Court: He has testified to that.

Mr. Oman: That is all.

The Court: I may have some more questions later. I do not have any more at the present time. That will be all now.

Tom Jones testified as follows:

Direct examination.

By Mr. Oman:

Q. Will you state your name, please?
A. Tom Jones.
Q. Are you one of the plaintiffs in this action?
A. Yes, sir.
Q. Do you live with Sakezzie?
A. Yes.

[fol. 209] Q. Did you hear the testimony of Sakezzie about having lost horses?

A. Yes, sir.

Q. Were you present at Sakezzie's home at the time these horses were taken?

A. Yes.

Q. How long have you lived here, Tom?

A. He lives there as long as he remembers.

Q. Do you know Dee Black?

A. Yes.

Q. Do you know the track which his car makes?

A. Yes.

Q. Can you tell the track Dee Black makes by his foot prints?

A. Yes.

Q. Did you do anything to try to find the horses about which Sakezzie testified?

The Court: I think the best way to get at this is the way I questioned Sakezzie. No doubt what you are getting at, Mr. Oman, is that this boy was around there the day Sakezzie's horses were taken, or the following day after they were taken. Is that it?

Mr. Oman: Yes.

The Court: Sakezzie's horses were taken in the night time. This is the boy, I suppose, that went out the next morning and found that they were gone.

Now, I want him to tell you in his own way just what happened, all he knows about it—just what happened, in his own way—and tell us about the tracks upon the bluff and the whole thing. Do you understand? I think it is better for him to tell it in his own way, then he can develop it. We can ask him about it afterwards. Don't you think so?

Mr. Oman: I think that is very fine. I was leading up to him going out, and have him tell his story, what he did.

The Court: All right. Tell him that.

A. I live at the same place with Sakezzie. Our daily activities are comprised of herding with the horses during the day, hauling the wood with the team, or going to the trading post in the wagon to get food staples, or different chores that we do about our work in our way of life.

And it is a custom with our operation that when all these [fol. 210] horses were turned in from their day's work we group them together before we turn them out, instead of turning them loose like would naturally be done by some operators.

When the last horse is brought in from their daily work, the balance of the horses are kept in the corral, but all is turned out at one time.

It was one of these daily affairs on this particular night that we turned our horses out, and I think it is about half a mile from our place as the tracks show that the horses were started to be picked up. They were not all in a group. They were scattered along the road there.

We found the tracks over the bluff there where I know the range riders' boots' foottracks, and also he has a shod horse, which we don't have, among their horses in this particular area.

And it was the custom for one of the boys—it was his chore daily that he goes after the horses at the first break of day. He went out at this particular morning, found out what I have already stated. He followed a little farther on top of the hill, where the horses were unloaded. It was right along the fence up to about a half mile distance from our home where the straggling end of the horses were grazing, where they were picked up, and tracked them forward to these horses that were leading the bunch, and grouped all together on top, and started to drive them off.

That is as far as the boy tracked them, and returned home. It wasn't too long when he returned and reported this to us, so we make ready to follow them and pick them up.

There were five of us I think went to find out what had happened. So we fetched the track from where the wrangler boy had left it, followed them. We thought he might not have been too far away from our place there. There is a windmill there, and there is a corral, more or less used as a community corral. We thought at that time he may have corraled them there.

But we found out he has taken another road, an old wagon road, a straight cut to the town of Blanding. So we followed [fol. 211] the same track he drove the horses, and the car track follows the horses—one was right near—must have been driving.

This was pretty early in the morning. The next day we got to Blanding just about sunup. When these boys that were loading horses saw us, they kind of quit loading, and one started to drive off his car into town. And in a few

moments he came back with some men wearing red caps, styled themselves as hunters, with some guns in their possession.

By the time when this group of men came, Dee Black came around, asked us what we were there for. I told him—I asked him about what he was going to do with the horses he picked up last night from our place.

And, of course there was one woman member in our group there, she got scared; she say, "We like to get away from here. Those men have got guns."

Dee Black, Leland Redd, Clarence Perkins, Jesse Johnson, those are the men I knew that were there in this operation loading horses. But these men that were brought over wearing red caps, with guns, were younger boys. I don't know which they were.

When I asked Dee Black that we would like to have the horses released, he told me he was going to haul them to Monticello. He told me to contact his boss over there, who was residing at Monticello, and told me whatever the boss said ~~over there~~ will be the thing.

We were exchanging words then. At this point, just about that time, that car came back, and that gave fear to this lady, and we left the scene there.

The Court: Have him tell us what about those tracks up on the bluff looking over Sakezzie's place. Tell us all about that.

A. After we lost those horses we would like to find further all those things were brought about—came about. So we wanted to cover the area there, just how he knew those horses were there.

[fol. 212] That is how we happened to find his horse track and boot track on the bluff overlooking Sakezzie's dwelling. And I think we have convinced our minds that he was watching all the time there just where the horses were, and I think he knew what we were doing right along, and ordered to get them. That is the way it come to our minds after we found his track and his horse track.

The Court: Whose track?

The Witness: This range rider, Dee Black, boot tracks.

The Court: They found them the next morning?

The Witness: The next morning they found out that is the way he dealt with them.

The Court: Go ahead, Mr. Oman.

By Mr. Oman:

Q. What about the car tracks? Did you know whose truck tracks they were, Tom?

A. Dee Black's pick-up track marks.

Q. Did these men, when they came with these guns, did they take them out of the car and hold them in their hands?

A. They came out of the car and had the guns in their hands.

Q. Did they place any bullets in the guns so that you saw them?

A. They had a car. They stopped their car parallel to ours, and then went on the off side. They were pounding the guns, and they were playing with those catches, trying to get it ready, or doing something with it.

Q. Tom, when you got there were some of the horses loaded in a truck already?

A. Yes.

Q. Were any not loaded?

A. Four head.

Q. Were those in the process of loading, that four head?

A. That is right.

Q. Who was doing this, the putting of the horses into the truck?

A. Dee Black.

Q. Who was with you, Tom?

A. Sam Chee.

Q. Anyone else?

A. Lynne Chee.

Q. Was that the girl, Lynn?

A. Bossy Sakezzie.

The Court: Where were the tracks of Dee Black's truck?

The Witness: From the time where he unloaded the saddle horse. That is where I saw his.

[fol. 213] By Mr. Oman:

Q. Then the saddle horse track went up on the bluff overlookiig Sakezzie's, is that right?

A. There is two cowboy boot tracks. I think they unloaded their horse there. It is quite a ways from the bluff—a little ways from the bluff there, but they went on foot together, they were sitting together over the bluff overlooking Sakezzie's house.

Th Court: Those tracks went from where he saw the truck tracks up on top of the bluff?

The Witness: They drove up a ways off the road there. But in order to hide the truck from view from across the valley they have to put their car a ways back from the bluff. Then they went on foot, to come to the bluff. That is the way the track marks showed.

The Court: What I want to be sure of is that the foot tracks, the horse tracks, were followed from where the truck was, up on the bluff. Could they follow the track from the truck up to the bluff so they knew the fellows who were on the bluff came from the truck?

The Witness: It was a foot track we saw over the bluff—where they came up to look over the valley. It is the same boot track mark we saw where they unloaded the horses.

The Court: At the truck?

The Witness: At the truck.

The Court: He knows those truck marks to be Dee Black's?

The Witness: That is correct.

The Court: We are going to recess until two o'clock. The court will be in recess until two o'clock.

Salt Lake City, Utah, November 19, 1953, 2:00 P. M.

(Plaintiffs' Exhibits 3, 4, 5 and 6 were thereupon marked by the reporter for identification.)

[fol. 214] The Court: Now I suggest to you, Mr. Oman, that you could get along a lot faster, I think, with these witnesses if you proceed about the way I have indicated this morning; that is to say, just tell the intepreter of what occurrences you would like to have the witness tell you, and then let him tell us in his own way.

One thing we must not forget is that we don't understand the ways of these people too much, or particularly the way they think and the way their minds operate. We don't un-

derstand what they regard as important, significant, and they don't understand us any better than we understand them. The interpreter is doing a fine job here. He is a very good interpreter. And I think we will get along better if you will just tell the interpreter in a general way what you would like the witness to tell you about, and then let him go ahead. We got two very good statements this morning that way. Sakezzie gave us some good testimony, and Tom here gave us some good testimony. So I suggest you proceed in that way.

Of course, if you have any specific thing, you go ahead in your own way. That goes for you, too, Mr. Thomas. Do as you please, go along in your own way. But I am beginning to get a little apprehensive how long this is going to take. I don't want to intrude myself in it any more than necessary.

I have had one other thing in mind—there is a dispute down there in the wilderness about the real estate. Now, while this lawsuit doesn't necessarily involve the questions about the real estate, this suit might be a very good place to perpetuate the testimony of these people with respect to that. In other words, here is a good place to get a record of what their testimony will be, and that is particularly applicable to the older people, and it will be especially applicable to those ancients down there who we got the names of this morning. I think we ought to get that testimony, get it recorded. Because it just seems to me that—it always has seemed to me since this matter was first brought to my attention—that there may be a basis, not in the legal titles do I mean, but in the field of possession.

Now, the fact of the matter is, if a fellow has possession of land and it is peaceable possession, he can pass that on [fol. 215] to his descendants; he can pass it on by descent; he can pass it on by will. There is no question about that in the law; don't need to have a deed to pass it on. You can pass it on by consent. That is a non-privity connection.

Now, if you have a prior peaceable possession that antedates the arrangements with the United States government at the time of setting up of the Navajo reservation, and which perhaps antedated the Treaty of Guadaloupe-Hidalgo —if that can be shown, I think all you need to do, really,

is to show it back of the Bosque Rondo—for the reporter, I will get that straightened out before the day is over—why these people may have some claim.

They won't have any claim if they participated in the treaty because they may have by treaty given up any cause here. If this little group did not participate with the Navajos down in Arizona and New Mexico in entering into a treaty under which the original Navajo Reservation was set up, and if they at no other time have done so, and if they are an independent bunch of people—and it looks as though they are—as a matter of fact, that is what Knox Patterson has been telling me for three years before he died. I am sorry he didn't live to see this through.

It looks to me, if those conditions are present, maybe we have got some basis here to give them some relief with respect to these land holdings. It gets into very fundamental questions.

Now, some of these old Spanish land grants—this is not a Spanish land grant, but some of these old Spanish land grants permitted the possession for titles in California, Arizona and New Mexico, and it may be that we have a situation here where the United States government has never acted, that there has never been any action with respect to this group or this land. It may be there has never been a treaty that concerns it or them. It may be they are entirely outside of that. And it may be that they have possessory interests that we may be able to find some legal means of protecting.

It was always my notion that sometime we ought to try [fol. 216] that out. When Knox Patterson defended the suit of the Bureau of Land Management which was filed here in 1950 he was raising that question, among others. He had a counter-claim filed, and in the counter-claim he claimed damages for taking their lands. And I ruled against him on his counter-claim in that suit for the reason that claims by people like these plaintiffs for taking their land now by virtue of an Act of Congress, must be filed with the Indian Claims Commission, and federal district courts are deprived of jurisdiction. So I could not give him any relief on his counter-claim.

Now, the Bureau of Land Management in that case asked

an injunction, and at first I granted a motion for a summary judgment and that went to the circuit court—granted a motion for summary judgment against the Bureau of Land Management—that went to the circuit court and they reversed it and said there were questions of fact that ought to be tried, and those have never been tried. Now, if they were tried, they would be questions of fact concerning these problems that I have just been talking to you about.

Last spring, in June, it was brought to my attention that these people had been driven out down there. And I asked the Bureau of Land Management folks to find out why that was the case. And as you brought out day before yesterday, Mr. Thomas—I believe it was you who brought that out—it was reported to the court that they had been driven out and that therefore the suit of the Bureau of Land Management was moot. And it was upon that basis that it was dismissed when it was—I don't know whether it was June or July last year—I think it was June.

Now of course that was dismissed because the Bureau was asking an injunction to compel these people to move off of that property, and I was advised they had done so. But now it appears in this matter it was only the livestock that was moved of; these people are still there, and they have always been there.

Now, the title to these lands—or rather, the possessory rights, if any the Indians have, in these lands, is not necessarily and not directly involved here. As I view it, it wouldn't make any difference who owned the lands, the agents of the [fol. 217] Bureau of Land Management are not entitled to go in and kill one hundred and fifty head of horses and burros the way they have done. That is said subject, of course, to you folks telling me about the law. But I looked into the law yesterday a little bit.

This problem in this lawsuit is one fundamentally that cannot be settled and ought not to have to be settled in a court. This is a problem of much wider scope than the issues in this lawsuit. What you have here is a band of people, as the testimony shows, who have lived in the place where they now are for generations. For example, Sakezzie says that he is seventy years old or more. He was born there, and he has lived there all his lifetime. And the other

folks, similarly. Sakezzie, moreover, says that his father was born there and lived there all of his lifetime, and likewise his grandfather.

Now, if you take the three generations, about one hundred and twenty years, you are away back of the Treaty of Guadaloupe-Hidalgo, which came along about 1846 or 1847, as I recollect—I think it was 1846. And it goes a long way back of the time when the Navajo Indians entered into a treaty with the United States government setting up the reservation.

Well, this involves so many problems that a court cannot handle; this involves very serious questions of administration that ought to be handled by the Department of the Interior through two of its agencies; one, the Commissioner of Indian Affairs on the one hand, whose duty and responsibility it is to look after these folks; and on the other hand, the Bureau of Land Management, whose duty and responsibility it is to administer the public land laws, the Taylor Grazing Act among others.

Now, the thing that is unfortunate here is that the Bureau of Land Management; and I say nothing in criticism of it—I think it is, however, a fact, as lined up with the livestock people down in southeastern Utah, and the Bureau of Land Management is fighting these Indians on behalf of the livestock men, the white livestock men down there, the Redds—Leland Redd's name has been mentioned in connection with every one of these occurences where the squaws were handcuffed, [fol. 218] josfled around until their wrists bled; with the occasion when Sakezzie's horses were driven from near his home in the night time and hauled off to the glue factory—Leland Redd has been mixed up in that—and other names have been mentioned here—what are some of those names, Mr. Oman?

Mr. Oman: Perkins——

The Court: C. C. Johnson—and what are Perkins' initials?

Mr. Oman: Clarence, I believe.

The Court: Clarence Perkins, and who were the others that were mentioned?

Mr. Oman: Black.

The Court: Dee Black is the employee of the Bureau of

Land Management, and Dee Black has apparently been the leader in all of these depredations upon the Indians.

Now, the Bureau has sided with the livestock people. Now, those livestock men I suppose have Taylor's Grazing rights in the Public domain that the Bureau of Land Management has issued to them, and they want that range for their own livestock. And in connection with that interest in that range on which to forage their own livestock, they have an interest, they claim, in protecting the range to see that it is not overgrazed; and so they are trying to keep everybody else off.

Now, on the other hand, the agency of the government that is directly responsible for the care of these Indian people, the Commissioner of Indian Affairs, has not done a thing in there whatever. So you have in the Department of the Interior two agencies, the one, the Bureau of Land Management, is energetic and active in the interests of the livestock men, while the Commissioner of Indian Affairs—the Bureau of Indian Affairs—is doing nothing at all to solve this problem.

In 1950 the deputy United States Attorney who was then handling this problem in this court, went down to Window Rock with Knox Patterson, the Indians' attorney, for the [fol. 219] purpose of seeing the Commissioner of Indian Affairs, who was going to be down there, and the Commissioner of Indian Affairs brushed them off, wouldn't talk with them, had no interest in this matter, apparently.

Now, that is an unfortunate thing. These people, Sakezzie, Ed Nocki, and the rest of these good people, are suffering down there as a result of the failure of the government to discharge properly its responsibility to them. The United States government is in the position of a guardian. These folks are wards of the government. That is the relationship. But the United States is not acting much like a guardian down there.

Now, the reason why, in 1950, I entered a summary judgment against the Bureau of Land Management was that it appeared that these very same folks had all their lives lived at this place in Montezuma Creek or nearby; their fathers and grandfathers had lived there. They had

no allotment on the reservation. As Sakezzie testified this morning, he says the only place he had is where he is.

Now, the government in 1950 was asking me to enter an order here throwing Sakezzie and these people out of their homes, out of their hogans, with their squaws and their babies and their flocks. And I asked them at that time, "Well, where will they go? If I throw them out of their hogans, off of their pastures, away from their homes, where will they go? Is there a place on the reservation for them?"

And I inquired about that, and do you know what the answer was? "No, the reservation is crowded. There is not any more room for further allotments there. There is no place on the reservation for them."

So I said, "Where will they go?"

The Bureau said, "We don't know."

I said, "You mean, then, if I throw them out of this place in Montezuma Creek, send them away from their hogans, take away from them the property and the pastures where they live, that they will have to just be turned loose on the highways and the byways—no place to call their home—no place for a home?"

[fol. 229] And the Bureau of Land Management wasn't interested in that at all. But I was. I refused to grant that injunction, and that was the reason. It might very well be after we tried out the issues I have indicated that we find these people had no legal claim to the place where they are. But they haven't any other place to go to.

Now, that poses the problem. That is the job for the administrative agencies in the executive department of the government. It is not the job for a court. This court has no power to give these folks a home, a place where they can live, and pasture for their flocks. I haven't any authority about that. I haven't any authority to order them onto the reservation or somebody else's allotments.

The situation is that where they now live there is a conflict with the permittees under the Taylor Grazing Act. If I order them back on the reservation there is a conflict with the Indians to whom the reservation has been allotted.

Here is a little band of folks that the Bureau of Land Management is doing its hardest to drive out from their homes. But where are they going to go to? They haven't

any place to go. Now, this is a problem for the United States government to handle, really, through the administrative agencies.

The Navajo Reservation, I am told—there is not any evidence here about that—is overcrowded, seriously overcrowded. These folks are livestock people, they are herders, their lands are badly overgrazed, because there are too many of them—too many of the flocks.

Now, it may be that the time has arrived when the area of the Navajo Reservation ought again to be enlarged. I don't know whether that is so or not, but it may be so. If there is not any place on the reservation for these folks, and they are not properly where they are, the government owes to them an obligation to find some place to go. The courts can not handle a problem like that. And it seems to me that the Bureau of Land Management possibly have been inhuman and cruel. It seems to me they have acted in violation of just and ordinary sense of decency. And it seems to me they have not acted in the public interest in attempting to [fol. 221] drive these folks off by force and by violence and by fear and threats.

As a matter of fact, the depredations of which there is complaint here were committed while this court had pending before it the very questions we have here. The Bureau of Land Management officials, it seems to me, may very well be in contempt of this court, because the Bureau of Land Management was the plaintiff in that action and while this action was pending here they saw fit to take the matter into their own hands.

Now, it is a very serious matter. I do not believe that this problem can be solved by force on either side. These are very peaceable, decent people. They have been here with us now three or four days. I am greatly impressed by their dignity, by their restraint, by their honesty. These people have testified in a perfectly straightforward way, and their testimony has been clear, consistent, full, frank.

Now, it is not going to do any good for us to get after the Bureau of Land Management and try to force them, any more than it has been good for the Bureau of Land Management to try to force these people. I think that force and violence ought to end in this matter—and before we get

through I am going to issue an injunction about that, so that the folks will be answerable to me. I am going to reserve some jurisdiction for that purpose here.

What I am suggesting, Mr. Thomas, is—I wish Mr. Aho was here, the counsel for the Bureau——

Mr. Thomas: I understand he will be here at three.

The Court: I am not going to repeat this. It is too bad he is not here. You can pass it along to him. It seems to me that it is about time that the Department of the Interior straighten out this problem.

It looks to me as though if I had the authority in the executive department of government I would knock somebody's heads together in the Bureau of Land Management and in the Bureau of Indian Affairs—and I would get this thing straightened out. And it wouldn't be Indians' heads that were knocked together, I'll tell you that. There is a very serious problem here. This ought not to go on.

[fol. 222] Now, at one time after the reservation was set up, Congress enlarged it. That is known as the Aneth Extension in Utah, south of the San Juan river.

Well, the Bureau of Indian Affairs ought to know whether this reservation is large enough or whether it is too small. The next natural extension I should suppose would be right where these folks are living, as far as Utah is concerned—because the reservation is right across the river. But I cannot do anything about that.

Now maybe I can reserve some jurisdiction here, and maybe I can help by communicating with President Eisenhower and drawing to his attention personally the kind of situation we have, where it seems to me two of the agencies in the Department of the Interior are derelict in their duties, the one for what it has not done to look after these folks, and the other because of its energetic, aggressive attitude on behalf of the livestock people, even to the point of using guns and force and to the point of destroying these folks' property, and to the point of attempting to drive them from their homes with their squaws and their papooses and their flocks.

Now that is a horrible thing. It is monstrous, that's what it is. These folks are here this week suffering seriously. I was advised last night that they are just about out of money. They brought some sheep—they slaughtered sheep

down in the wilderness and brought them along with them, wrapped up and preserved. That meat is just about gone.

A few of the local people have heard about their plight and baskets of food have been taken down there.

This lawsuit has taken longer than we thought it would—but that is always true when you have to get the testimony through an interpreter. And it is important to them to have their claims fully presented here. In fact, their leader, Sakezzie, has said they have been a long time getting to the point where they can have their story heard, and they will stay here as long as it takes.

I remember a year ago, just about, there was a little dog down beside the highway between Cedar City and St. George: it had either been abandoned by its owner or it had [fol. 223] been lost. And the little dog was sitting alongside the highway out there, looking up and down the highway every day for its owner. It had no food. Each day it got thinner, wilder, and when folks came along and tried to catch the little thing, it rushed out into the brush, and they couldn't do it.

That story was published in the newspapers in this city. It excited great interest and sympathy of the citizens of this state. There was much discussion. There were many helpers to help the dog, to alleviate its suffering and find it a home.

Well, it occurred to me last night that maybe the people in this community ought to be interested in these human beings whose plight is very much like that of the dog. They are camped out here in rude tents, alongside the highway, without food, their resources exhausted. We are having stormy weather, had the first snows, heavy wind, ice. These are old men, some of them, and these women and babes in arms.

Now, instead of being interested in helping these people, the Bureau of Land Management has been after them with guns, destroyed their livestock. Just seems to me there may be a lesson in that. I don't know what the Court is going to be able to do about it. It is a problem that the machinery of the Court is not equipped for.

It seems to me that it is not the Indian folks who are to blame here; seems to me they haven't done anything wrong. Seems to me all they could do is try to exist down there, in

one of the most barren places on earth—certainly one of the wildest, most barren places in the United States. A poor kind of living at best can be scratched from that earth.

And the Bureau of Land Management, with all of the power and all of the resources of a great nation, the United States of America, is trying to drive these poor people out of their ancestral home.

These are not just little temporary wickiups; the hogans are old, solid, stone structures that have been there for [fol. 224] generations. They set up reservoirs for irrigation waters that arise. In terms of the Indian culture and history this is a very permanent establishment down there.

Well, if I were in the Bureau of Land Management and had anything to do with this business, I would be deeply chagrined and embarrassed, to say the least.

These people are human beings. I wonder if folks ought not to be as interested and sympathetic with them as they were with that abandoned little dog along the highway?

Seems to me that these people have been treated worse than dogs.

Now the question is, what can we do about it? We can write learned treatises about the law; make findings of fact. In the final analysis nothing that I can do here will solve that problem. And if the court attempts to use any kind of force against the other side, I don't believe it solves anything. Seems to me this is a problem that ought to be resolved in the spirit that these fine, noble Indian people have exhibited here—restraint, dignity, and intelligence, long-suffering.

They don't want to have any trouble with anybody, just want to get it worked out happily, so they won't be in here any more.

The testimony here this morning is that they don't let their babies and children and women sleep in the hogans any more at night because they are afraid that the next move will be that desperadoes will come in and do them harm. So they sleep out in the rocks and the crags, up among the bluffs.

Well, now, it is time there was an end to that. It seems to me, gentlemen, there should be a Congressional investigation of this affair. Seems to me a committee of the Con-

gress should come out here, and it seems to me that the agencies of the Executive Department should go to work and straighten this problem out.

This is the second lawsuit in this court in four years [fol. 225] about this matter. And there was a lawsuit in the state court begun down at San Juan county, that went up to the Supreme Court of Utah, which obviously did not settle the question in this lawsuit, and which I do not think settles the questions that were raised in the earlier lawsuit in this court, for reasons I have stated. It is not going to ever solve this problem, it seems to me, to be leaving the situation in such a condition that we have repeated lawsuits, none of which are conclusive of anything here.

I think we have just got to find an answer. There is something I can do about the issues in this lawsuit, and I mean to do it before we are through. But that is not going to solve the main problem here, I don't think—and I mention these things because I want you all to be thoughtful about them, and perhaps we can have some conferences and work out some way of finding a solution for it. Maybe I can initiate some of those conferences.

I think the situation down there is monstrous. As a matter of fact, I wonder if there is not a question as to these folks, these aborigines, being a great deal more civilized than these Bureau of Land Management representatives that drove them out.

Seems to me what has happened here is just a cold-blooded depredation. And we are sorely troubled about it, because I don't think anything we do here is going to solve it. But maybe we can find a way to solve it that is going to be a whole lot more satisfactory than any decree the Court can render.

I am going to reserve some jurisdiction here to enjoin these fellows from bothering these folks any more, until the agencies of the government get together and solve the problem. I think I have jurisdiction to do that.

Somebody has the responsibility to either leave these folks alone as they are, or find them a new home to which they can go. Certainly a great nation which is the guardian of these folks, which has taken away their lands, pushed them off of the reservation, owes them more obligation

than just to turn them loose, homeless, with no place to go. We have that situation here.

[fol. 226] Well, call your next witness.

Mr. Oman: I appreciate very much what Your Honor has said. As to the questioning of these people, I have tried to keep it within the bounds of required procedure to avoid objection from the government.

The Court: I understand. What we want to know is what happened down there, how it has happened, under what circumstances, as it relates to this lawsuit.

Now, that is very wide, I think within the proprieties—I think it is very wide within the ordinary rules of procedure here, the rules of evidence; because you are dealing with intent, intent of the Bureau officials. You are dealing with the question of wilfulness of the Bureau officials.

When you begin to deal with the question of intent, of course you are entitled to show the conduct of these Bureau officials on other occasions, in the whole situation. So it is pretty wide, and it has taken us a lot of time to proceed with it.

It doesn't make any difference how much time it takes, I am not going to hurry it along. I hope, in the interest of these poor folks, who ought to get back down there where they are perhaps better able to look after themselves than they are here, that we might bring it to a conclusion as soon as it is possible in view of our desire to have the whole matter presented adequately.

Go ahead.

Tom Jones, the witness on the stand at the time of recess, was thereupon recalled to the stand for further examination and testified as follows:

Direct examination.

By Mr. Oman (Resumed):

Q. Tom, I hand you what has been marked for identification Plaintiffs' Exhibit No. 3, and I ask you if you can tell us what that is?

A. This is one of our members, one of the old—the oldest

lady there that we have in our neighborhood, that is mounted on a burro.

[fol. 227] Q. Is that one of the kind of burros that have been taken from the plaintiffs?

A. That is correct.

Q. I hand you what has been marked for identification Plaintiff's Exhibit No. 4, and ask you if you can tell us what that is, Tom?

A. This is one of the daughters of Hosteen Sakezzie. This girl's duty is to take care of the sheep. She goes out with the flock, out to pasture, daily.

Q. Does that show the range which is used by Sakezzie which this girl is herding in there?

A. That is right.

Q. I show you another picture, which has been marked Plaintiff's Exhibit No. 5, Tom, and ask you if you can identify that?

A. This is Hosteen Sakezzie's reservoir. That is a place the water is impounded back of the dam.

Q. How close is that to the hogan in which you live, Tom?

A. I live close to the reservoir there, not too far away.

Q. I show you another photograph, which has been marked Plaintiff's Exhibit No. 6, and ask you if you can tell us what that is, Tom?

A. The person that is in that picture is Mrs. Sakezzie, and the hogan that is on the picture is the home of these people. And the field back there in the background is the cultivated land that they own.

Q. Does the bench which is shown on the picture to the left indicate the place where you have testified you found the tracks of Dee Black the night your horses were turned loose?

A. No, it would be farther to my right. That point is not visible on that picture.

Q. Is the reef shown on the picture just an extension of the same reef on which the horses had gone?

A. Yes, it is a kind of canyon, like. But the place where the horses were taken is across from one of these fields there.

Mr. Oman: I offer Plaintiff's Exhibits 3, 4, 5 and 6, Your Honor; photographs of the area, and of one of the animals in question, and of an old residence of that area.

Mr. Thomas: If Your Honor please, I would like to show them to Mr. Black when I put him on the stand. I have an idea I will have no objection, but I feel I should show them to him or Mr. Kinnaman, before I——

[fol. 228] The Court: If there is anything wrong with them you can move to strike them. Do you have any objection now?

Mr. Thomas: No.

The Court: They will be received. After you examine Black, if you want to you can make a proper motion.

(Plaintiff's Exhibits 3, 4, 5 and 6 were thereupon received in evidence.)

Mr. Oman: That is all.

Cross-examination.

By Mr. Thomas:

Q. Mr. Jones——

Mr. Thomas: I will endeavor to question him as the court suggested.

Q. Would you ask Mr. Jones if the men with the rifles who he saw at the time when he went to Blanding following these horses, didn't appear to be deer hunters?

A. I don't know whether they actually were deer hunters, but their clothes, the apparel they were wearing at that moment was hunters' apparel.

Q. They had red caps, I believe you said?

A. That is correct.

Q. They didn't threaten you with those guns, did they?

A. They didn't say.

Q. And Dee Black had no gun, did he?

A. The only thing I seen on his person was that braided bull whip.

Q. Did you ask Dee Black where he got these horses?

A. I did.

Q. And he told you exactly where he got them and what time of the evening he got them, did he not?

A. He didn't say.

Q. Didn't he tell you where he got them, at all?

A. He answered that he picked up these horses where we

saw the track that we said where he picked up those horses, exactly the same area there.

Q. Did he tell you who was with him?

A. He didn't say that.

Q. Are you acquainted with Bob Krumm?

A. I wasn't.

Q. When Mr. Black suggested that you talk with Mr. [fol. 229] Kinnaman about these horses did you go and talk with him about them?

A. I didn't go over there.

Mr. Thomas: That is all.

Redirect examination.

By Mr. Oman:

Q. Tom, do you remember what date this was of the month and what day it was, when you found these horses in the corral?

A. It was in the month of November, the first day of November.

Mr. Oman: That is all.

Recross-examination.

By Mr. Thomas:

Q. How old are you, Tom?

A. Twenty-four years of age.

Q. You are Selezzie's son-in-law, are you not?

A. He is my grandfather. I happened to marry the younger sister of this old man's present wife.

The Court: I have a question. Mr. Thomas asked him whether these fellows with guns frightened him, and he said he didn't say—these men didn't say.

Now, what I want to know is whether they were put in fear, whether these boys, these Indian boys were put in fear by the show of guns and the way they were handled. Was there anything threatening about the way those fellows acted?

A. Well, they were working their guns and moving them, but not directly pointing at us. The way it happened was,

when the car came in from town—one of these men went into town and brought these boys back. When we first came to the corral; when they returned, they set their car and the boys got off of the opposite side of us.

Just as soon as they were on the ground they started to cock their rifles. And naturally, of course, we feared it was meant that way, if we had any violent intention at that moment.

Recross-examination.

By Mr. Thomas: (Resumed)

Q. Did you say anything to these men?

A. I didn't exchange any words with them.

Q. Dee Black wasn't with them, was he?

A. Leland Redd is the one that brought these men back.

[fol. 230] Q. Well, Dee Black wasn't with them?

A. No.

The Court: Well, the way I understand it is that Leland Redd and Dee Black and a couple of other fellows with them were loading Sakezzie's and the other horses into trucks, and when the Indian boys showed up that morning Leland Redd left the group and went over to Blanding and came back with these fellows with guns. Now is that the way it happened?

The Interpreter: That is exactly the interpretation of his statement, your Honor.

The Court: That is the way I understood it. And Dee Black was there working with the horses together with Leland Redd and two other men, before he went after the men with the arms?

The Interpreter: That is correct, your Honor.

The Court: When Leland Redd came back with the men with the guns, then Leland Redd and Dee Black and the others proceeded to load the horses into the truck and haul them away?

The Interpreter: That is exactly what they did. Of course they hadn't started their truck with that load of horses when they left. They got afraid when these men were brought back there to the scene with guns, so they had to leave.

The Court: The Indian boys left?
The Interpreter: That is right.
Mr. Thomas: No further cross-examination.
Mr. Oman: That is all, Tom.

Bill Hatahley, testified as follows; through an interpreter:

Direct examination.

By Mr. Oman:

Q. Will you state your name, please?
A. Tom Hatahley.

[fol. 231] The Court: We will be in recess for five minutes.

Q. You are one of the plaintiffs in this action, Mr. Hatahley?
A. That is right.
Q. Are you acquainted with all of the other plaintiffs in the action?
A. That is correct.
Q. Now, Bill, I want you to just tell us in your own words where you people live and how you make a living, what things are important to the Navajo, and what positions are most dear to you.

Mr. Thomas: Before he answers that, Mr. Interpreter—if your Honor please, we will stipulate he would testify substantially the same as Hosteen Sakezzie about these matters—to shorten the matter; of course we feel any damage beyond the market value of these animals is immaterial, and therefore object to it, your Honor; but I believe it will shorten the matter very materially; we would so stipulate.
The Court: Is that satisfactory to you, or do you want to examine this witness?
Mr. Oman: It is not satisfactory, your Honor. I want to examine him,
The Court: All right. Go ahead and examine the witness. First, find out where he lives.

A. I live at a place called Montezuma Creek.

The Court: Is that near Sakezzie?

A. Yes, it is close by there—in that neighborhood.

The Court: Ask him how he and the other folks in that vicinity make a living.

A. We are livestock operators in that area. It means we raise sheep, goats, horses, burros and cows.

The Court: Now, Mr. Oman asked you further if you could tell us in your own way what is important to the Navajo down there to make his living, and in living in his way of life, and how important are his horses.

A. Traditionally my people, the Navajo people, down through the centuries, is a very religious people, and we have ceremonies that are connected with our daily lives.

[fol. 232] Some ceremonies are of different natures, and we have numerous ceremonies. It is almost knitted into the lives of our Navajo people, and out of that, one of the outstanding ceremonies is the ceremony we call the Blessing Way, and this is the ceremony that governs all other ceremonies we have in existence in the Navajo land.

In this ceremony, the Blessing Way ceremony, we pray to the Gods that govern these animals. We pray that we may obtain certain kinds of horses, animals that we desire to own that is essential to our way of life.

In this Blessing Way ceremony, that is the major ceremony of the Navajo nation; comprises a lot of elements in that ceremony. One of those elements is, we have sacred mountains, one on the east side, one on the south side, one on the west side, one on the north side; and to our way of thinking, handed from one generation down to another, we tell each other, our people, our children, that within the bounds of these four cardinal sacred mountains is the homeland of the Navajo people, and the rainbow around these mountains, around the border of these four sacred mountains, is our spiritual boundary or exterior of all our Navajo home land.

These mountains are placed by the Gods that we believe in for our use, and it is to our knowledge in these mountains are pillars of turquoise, white shell and red shell and black shell. By that we come down to the point where we use these precious stones for carving animals. The most outstanding carving turquoise shell in our medicine fetish is

a horse. That is the way our ceremony runs. And to a Navajo's mind, when we think of a horse it is a general expression for all the types of animals that we own.

If we were to break it down into all the classes it would mean that the horse stands out generally for all the animals, that is, cows, sheep, goats, bulls. This is the way our life has been placed for us in Navajo land, and we were to keep up our believe for this life, and it is to continue within the bounds of our religion until there shall be no more time.

The Court: Has he finished?

[fol. 233] A. (Continued:) This is just to give the court a general idea of the way a Navajo believes in his God, but it is a question for anyone to study, to be an understudy of the older men. We do know all this language, the method of doing things, that has to be taught into the younger generation, just like a white man would go about to learn his profession in different fields of endeavor.

The Court: Well, now, before we leave that and discuss something else, I have been told that all this week these people get up down in the pasture before daylight and all of them, men, women and children, leave about five o'clock in the morning to come up here to court, and they arrive here about a quarter of ten.

In the time between five o'clock in the morning and a quarter of ten, will you have Bill tell us where they go and what they do? I understand—if I may finish that—I understand that they go up on the mountain and hold their religious ceremonies?

The Interpreter: Yes, I know—I am following your thought.

A. That is correct. We go out into the mountain, to a solitary place, where we pray that justice may be done to us.

The Court: And that their horses may be returned to them, I suppose?

A. That is correct.

The Court: Now, what we want to talk about, Bill, more particularly, is, how important is the horse down there in their lives, and what losses they have suffered because they no longer have horses.

A. As I stated before, that the name of the horse is a general name for all the animals that we own; thereby, when we get a colt we feel—a Navajo feels his prayer has been answered. He starts to take care of his horse and raise the type of horse that would fit his needs. And we raise our colts, then, to break in gentle.

About when they get three years old, we start in to train them for their usefulness in our way of life. About five years old they will be big enough to do a full day's work for [fol. 234] its master. And during this period when a horse is well reined, enough to be ridden, we start to train him to endure the hardship that is almost natural in the part of the country that we are living.

We have drouth periods, heavy snow at times when the brouse, the grasses, are all covered, ice over them. We train our horses for those emergencies. During our training period we tie them to a post over night, water him and then tie him for the second night. Some of the horses we lost endured for three nights, just on water, they live on that for their endurance test. And that is the way we train our horses, so if any calamity falls on the Navajo land we know we have a horse that would endure all those hardships, and we know it is safe to own that type of horse that we have been raising.

Correspondingly, we train our boys that way, too. When they become five years of age we wake them up early in the morning—learn to be an early riser, and run races to test their strength and harden themselves for any eventuality. And so, correspondingly, we train our boys and our horses that way, so in case hardship shall befall the Navajo land they could ride these horses to a land of safety, where the Navajo people could be safe from disaster.

That is why a Navajo-trained horse could endure much more adversity than any other known horse that I know of. That is why a Navajo don't raise any feed for his horse. The horse has to find his own feed, and it is not a punishment to the horse in midwinter when the snow is deep on the ground, in case some emergency should arise within the family. The horse is always willing to take his master out to a place where help could be obtained.

And the same is true in the summer time, when the water

dries up in the waterholes, we could go out, put little barrels on each side of a horse and go out, even to a great distance they could bring the water to our camps and to our families.

That is why the Navajo people has love for his horse, just like a father loves his child—that is the way a Navajo feels to his horse. He raises him up to a point where he [fol. 235] is trained to meet any hardships. I just wanted to know if I was taking too much of the court's time?

The Court: You see, we want to understand all about this case. Now, the life I have led is different from the life these witnesses have led, and different from the lives these attorneys have led. So I think the best way to find out about this is not for us to ask questions from our ignorance, but to let these people tell us in their own way. That is why we are proceeding this way. If it takes a long time, that is all right. Now, maybe you have some other questions you would like to ask?

By Mr. Oman:

Q. Bill, will you tell us at what age you start to train the child in the value and worth of a horse, and how you do that? Just go ahead, in your own words.

A. We start to train our children when they are at five years of age to start to learn to ride a horse, and it is almost a common thing in the Navajo family that we have names for all the horses we own. And it is a common thing to an Indian child to know all the horses that is in the family—the horse ownership.

We would give a descriptive name to each horse, and the child would fall in love with a certain horse, and then we would allow him to be kind, to take care of this horse and use it as he sees fit—and it is the life of a Navajo.

And we have schools on some part of the areas there, and because of livestock operations at different seasons of the year we are forced to move farther away from the schools, sometimes ten miles, sometimes fifteen miles to these day schools, and it becomes necessary that our children has to move with the family, so we should have the horses. In fact, they ride to school daily sometimes as far as ten to fifteen miles away from the school proper, and go over there during the school hours during the day.

These horses are trained to withstand hunger and they are tied there for an entire day without harming the horse. That is why a lot of our children are not in school. This school that I have reference to is a little day school where just a few children could be taken care of.

[fol. 236] This is why a Navajo Indian, because he has not any access to a school like a white child would, that is why we think in terms of Navajo way of thinking of life—that is why we don't get the necessary schooling for our children. Some of these children leaves these schools too early, and come back into Navajo life, and that is why he has to pursue the same livelihood that we have had for years, and that is why a horse is so valuable to us in our way of living, because we use the horse to herd sheep, use these horses as a team to cultivate corn fields, use these horses to look after the cattle; use these horses for other activities of the life of a Navajo in the Navajo country.

By Mr. Oman:

Q. Can you tell us, Bill, whether it is possible for the people to live in this area without horses?

A. They couldn't live in this area without the aid of any horses.

Q. Do your people have fear because your horses are gone and you are still in this remote area?

A. That is correct.

Q. Can you tell us in your own words what these fears are?

A. What we fear mostly is, we still have families. Those families need to be taken care of, with fuel, water, and other necessities that constitute a Navajo's life. And it so happens that we have to go for wood anywhere from fifteen miles up to thirty miles distance, where we could obtain fuel for our families. And for water we have to go anywhere from ten miles up to fifteen miles to get our domestic water for our family.

Would it give a person a horror to be on foot and have to obtain his water that distance—probably around ten miles? Suppose a bad storm came up, and a blinding blizzard should come up, would you think that a man, the head of a family, supposed to have a necessity for his family,

and been caught in the middle of a storm, away from home, when he knew his family didn't have any water or wood, would that be enough to put fear into a man? And it is also true of our older people, we have to help them and obtain water for them and wood. If there happened to be a bad storm come up before you returned, they may be frozen to death. That is the kind of fear that is hovering over people in that area.

[fol. 237] Q. Bill, can you tell us how long you have lived in this area?

A. I have lived in that area all my life, and my grandmother states she was born there, and lived there in her generation. My great grandmother, my mother's mother, said she was born and been raised there in that area, and her mother was there in her lifetime. That makes three generations past, as far as he knows. His life is the fourth generation that has resided in this area.

Q. How many people are in your family, Bill?

A. In my family, I have five girls, two boys, myself and my wife. That makes nine, I think.

Q. Any old people in your family to take care of?

A. This old man, his name was stated this morning, Tomas. He is the only old people residing with him in his area. That is his grandfather.

The Court: Ask Bill how old he is.

By Mr. Oman:

Q. How old are you, Bill?

A. Forty-seven years of age.

Q. Bill, now these horses have been gone about a year. I understand the children have been used to doing their first chore, that was to go and find these horses in the hills and bring them in, and that the women use these horses to herd the livestock. How do they feel now when they wake up in the morning and there are no horses?

A. It causes them a feeling which grieves them that they have no chores to do except to think about it, that they have lost their horses—nothing to do. And that is the way it grieves these children.

Q. I understand, Bill, that you Indians break a horse and

build into his body the endurance to meet the hard conditions in which you live. Did I understand correctly that you tie him up for three days and three nights without either food or water to see whether he is an animal that can stand that harsh condition?

A. That is correct.

Q. Bill, do you understand the endurance of a white man's horse? Do you know what endurance he has compared to an Indian horse?

The Court: I don't think that is material. You haven't [fol. 238] asked him, I think—or if you did it escaped me, whether he lost horses or burros; and when and under what circumstances.

Mr. Oman: I didn't do that, your Honor. I thought it had been covered in Sakezzie's testimony how much the whole group lost.

The Court: I think you should inquire about this man.

By Mr. Oman:

Q. Bill, we want to know how many horses, if any, you have lost in this past year, 1952?

A. I lost five head of horses—three horses, two burros. It happened to be that one of these horses was a stallion.

Q. One of your horses was a stallion?

A. That is correct.

The Court: I didn't understand. He said he lost five horses, then you said he lost three?

The Interpreter: I should have said five animals; two horses, one stallion, a mare, and one coming-up horse—I don't know whether it is a horse or a filly.

By Mr. Oman:

Q. Do you know where they went, Bill—what happened to them?

A. These horses drifted back into the area, in this disputed area. It was on a rainy day, where you could distinguish the tracks made by these horses. My boy of eighteen years of age went after the horses that particular morning, found out that the horses went into that area that we are concerned about. And they saw the track, that

the range rider came there, by his horse tracks, and picked up these horses and drove these animals to the corral. My boy was following up to this point where the horses were corraled. I don't know why he had one of those horses released, but it was not my horse. It happened to be the uncle of this boy of mine's horse. That was the only horse released back to him out of this group of horses that were picked up by the range rider.

Q. Did the boy say he saw the range rider on that morning?

A. That is right. He was with the horses in that pen when the boy came up.

The Court; The range rider is Dee Black, is that right?

A. That is right.

[fol. 239] By Mr. Oman:

Q. Did you ever try to get your horses back, Bill?

A. There is no way I could follow up my horses. There was one time ten burros were picked up on the Montezuma wash there. The man that saw him, he is not present in this group. The range rider came down and picked up these burros. They were in a field of corn stalks. There was an artesian well not too long ago drilled there, and was a place where these burros all went, most of them grouped together there one time. Ten head were picked up at one time, and they were hauled away. Happened to be one of my burros was in this group.

Q. Q. Bill, tell me about a horse in your own way—his nature, about the place where he is raised. That is, a horse raised in one range, will he ever leave that range if you leave him alone?

A. That seems to be a mental instinct of a horse. He always goes back to the place where he was born and raised.

Q. Were these horses of the plaintiffs raised in this area that is in dispute, Bill?

A. That is correct. That is the type of horses that we lost.

Q. Do you ever sell any of these horses, Bill, to anybody?

A. No, I don't sell any horse.

Q. Do any of the plaintiffs sell them?

A. No. We don't have any horses for sale, because we only have the horses that we need for our operations and in our lives.

Q. On the range, Bill, do you have to herd these horses in order to keep them where you want them, or is there any fence to head them off?

A. This is on open range, so they go about; sometimes they group together.

Q. Now, Bill, if you should buy horses from some other area and bring them back for your people to own, will they stay in this range? Can you tell us about that?

A. As I said, where we live is an open range. There is no pasture fences. And I stated the nature of a horse is that they will go back to the place where they were raised.

Q. It is quite a problem for a Navajo to have a horse brought in there and restore the horse ownership?

A. The only way I see to have a strange horse brought in there, a man almost has to build a corral, and has to buy feed, buy hay and grain to take care of the horse by not turning it loose on the range, like they did with their old [fol. 240] horses, their former horses. But it would cost a lot of money to up-keep this type of horse.

Q. Is it your idea, Bill, that you would have to buy mares and keep them where they can be fed until you can raise from those mares colts raised in the range, so you would know you would have horses that would stay?

A. That is a costly project to my knowledge, because buying a mare and raising a colt down there, it would be some four to five years before this colt is matured enough to be used for the need of the Navajos, and we already had experienced two seasons of it, had those problems and hardship that long.

Q. How else would you get back horses then to replace those you have lost?

A. That is quite a problem. We just don't know exactly how that could be materialized.

Q. Could you herd horses, if you bought enough horses to replace those that had been taken—could you herd them and keep them in this range?

A. That would be one way of doing it. But it would cost a lot of money for that kind of an operation.

Q. In breaking your horses I guess you speak Navajo words, use Navajo signs to them to indicate what you want them to do—is that right?

A. That is right.

The Court: The answer was what?

A. That is correct.

By Mr. Oman:

Q. And is a white man's horse a horse which an Indian can use, Bill, in the same way, with the same efficiency as he can use a horse that he has raised and broken himself?

The Court: I think he has made that clear.

By Mr. Oman:

Q. Bill, I don't believe you told us anything about the value a horse has in the heart of an Indian.

The Court: Well, I think he has told us about that at considerable length.

Mr. Oman: In the after-life, your Honor.

The Court: No, he didn't say anything about that, I think.

[fol. 241] Mr. Oman: He covered it in this life. I think it is tied to the life after this existence.

The Court: I believe he would testify, wouldn't he, to what Sakezzie says——

Mr. Oman: May I ask him that? I think he has given more thought to this.

The Court: Yes, go ahead.

By Mr. Oman:

Q. Bill, will you tell us in your own words the value to a Navajo, the use to a Navajo of a horse in the life after he dies here on earth?

A. In our religion we are told if he has used a horse in this life and it is very vital to his life in this life, when he dies and goes to the Great Beyond, we are told that

horses are needed in the next life, and that is why, when a Navajo dies, his best horse is killed over his grave, and that goes to show that he has use for a horse in the life hereafter. And we are told it reflects his endeavor in this life when he is well-mounted, to enter into the next life and come with a good looking horse, well mounted; his social standing in the spiritual world is much more respected when he comes into that land mounted on a good horse.

Mr. Oman: I believe that is all.

Cross-examination.

By Mr. Thomas:

Q. Do you have any horses now, Billy?

A. I have two old geldings there, just about to die of old age now.

Q. You mentioned that these horses, these five horses—that is, the three horses and the two burros, drifted back into this disputed area. Where did they drift back from, Billy?

A. I happen to live in the fenced area, exterior boundary fences there. Of course I don't own the land there. I just live next to that fenced area. And it don't take any time until I have my horses slip over in these disputed areas.

Q. You live on the Indian Reservation, do you, Billy?

A. There is where we have been forced back to live in.

Q. That is where you live now?

A. That is where I am residing now. We are forced back [fol. 242] onto the reservation. And it was already contested area in there. Just to give you an idea, the livestock I am running now, I have to use the range less than a mile and a half square.

Q. That is where your sheep and other livestock are?

A. That is right.

Q. Are you a member of the Navajo Tribal Council, Billy?

A. That is right.

Q. Did you discuss with the other Navajos the matter of eliminating these horses from the federal range?

A. Yes, I have discussed it with the people at different times, but the problem is, we have no place to put them.

The Court: Then he wasn't even a trespasser living in this disputed land at the time his horses were taken? Ask him that.

A. My permitted home was in this disputed area; since we were forced to go back into the reservation proper, almost to the fence, is where I am living at the present time.

The Court: Was he living there on the reservation when Dee Black took his horses?

A. That is correct.

By Mr. Thomas:

Q. Were the horses on the federal range——

Mr. Thomas: I believe he testified, if your Honor please, they drifted back into the disputed area.

The Court: That is the way I understood it.

By Mr. Thomas:

Q. Were they on the disputed area when you lost them?

A. That is correct. It is in this disputed area. Because I stated in my testimony, I had lived there all my life.

Mr. Thomas: That is all, Billy.

Redirect examination.

By Mr. Oman:

Q. Bill, will you tell us about being forced back? Do you know Knox Patterson?

A. I know Knox Patterson.

Q. Did Knox ask you people to go for a short time in [fol. 243] this area while he finished this lawsuit you had in this court about two or three years ago?

A. That is correct.

Q. Did Knox tell you that to save bad trouble between the Indians and the white people he wanted you to go back for a while until this lawsuit got out of the way?

A. That is correct.

Q. What kind of trouble did he tell you you might have?

The Court: I don't think that is proper.

By Mr. Oman:

Q. Bill, is that the reason you went back into this reservation for a short time?

A. That is correct.

Q. Is it while you were there, waiting for this trial to be settled that your horses went back where they had been raised and were there taken?

A. That is correct.

Q. Bill, do you know that Knox made this same request of all these other plaintiffs?

A. Yes.

Q. Did they all go back except Sakezzie into the reservation to wait until this trial was completed?

A. That is correct.

Mr. Oman: That is all.

Recross-examination.

By Mr. Thomas:

Q. Billy, isn't it a fact at the present time that there are too many horses on the reservation, and that the Indian Service is buying these horses from the Navajo Indians at ten dollars a head?

A. That is the kind of horse program we have over on the reservation.

Q. Is that a fact, that they are doing that?

A. Of course, the kind of program they have is optional. It is up to the owners whether they want to get rid of some of those old horses that they have no more use for.

Q. Are the Indians selling them to the Indian Service, Billy?

A. That is on the reservation, they did—not these people that are particularly in question at the moment.

The Court: Well, they are not first-class horses, anyway? Ask him that.

A: That is meant to get rid of these old horses that they have no further use for.

[fol. 244] The Court: But which are still eating up the forage?

A. That is right.

By Mr. Thomas:

Q. Aren't they the same kind of horses, Billy, that have been running on the open federal range?

A. No. We had some good horses there they were taking away.

Q. Were some of the horses that were taken away like those that are sold from the reservation?

A. No.

Mr. Thomas: That is all.

Mr. Oman: That is all.

The Court: Wait a minute. You haven't asked him about the brand.

Mr. Oman: I didn't do that, your Honor. I thought we had covered that.

Further redirect examination.

By Mr. Oman:

Q. Do you know whether these horses that were taken were branded?

A. They carried a brand. We have brand on these horses. Some of these horses carries the Indian service brands, the kind of brand that is used on the reservation. And some of these are carrying the recorded brands from the state of Utah.

Q. Bill, what is your policy in branding horses? At what age do you brand them?

A. Two years old.

Q. Brand them when they are two years old?

A. Yes.

Q. Were these horses broke, Bill, do you know?

A. These were all gentle horses, usable horses.

Mr. Oman: That is all.

Mr. Thomas: That is all.

The Interpreter: He would like to thank the judge that he had opportunity to express.

The Court: And you thank him.

Mr. Oman: Shall we proceed?

The Court: I have a little question about that. These people have their families. They have to go back out there

to the camp ground and prepare their food for the meal [fol. 245] tonight and get the families settled. You might ask them how long they can stay and be convenient for them. We don't want to create any hardship about it. So you might ask them about that. Ask Sakezzie.

The Interpreter: He says, I think it is better for us that we go back to the camp and kind of warm up our camp, because we have got some babies here, some ladies, and quite a few there contract colds.

The Court: You think it is better to go now?

The Interpreter: That is what he states.

The Court: If there is any hardship out there that these people are suffering, if there is any sickness among the little children or the old people, you let me know about it, will you? You tell him. You let me know about it if there is.

The Interpreter: He says, I think there are two ladies there running fever in the group.

The Court: Would they like a doctor?

The Interpreter: He says she has contracted a cold; she is having trouble with her eyes. I think she has a sty.

The Court: Well, now, do you folks still have a federal physician here who goes over and takes care of the prisoners.

Mr. Thomas: I can't tell you definitely, your Honor. I am sorry. I will ascertain and come back.

Deputy Marshal: Yes, we have one.

The Court: Who is he?

Deputy Marshal: Preston J. Burnham.

The Court: Will you tell Dr. Burnham the court directs him to look after these people while they are out there.

Deputy Marshal: Yes, sir.

The Court: If he has any question about it, have him phone me. How early is it convenient to come in the morning?

[fol. 246] (Interpreter interrogates the Indians.)

The Interpreter: As you know, they are traveling in open pickup; still, it is better for us we start the court at ten; be a little warmer to travel for us.

The Court: A little better, is it? We will start at ten o'clock, then, tomorrow. Now, Mr. Oman, how many more witnesses have you?

Mr. Oman: I have four more, but they will be short, I believe—not nearly so long as the others.

The Court: What is the situation of your case, Mr. Thomas?

Mr. Thomas: We have Mr. Black—I am not sure we will put Mr. Kinnaman on again—Mr. Black and Mr. Leland Redd; Mr. John Rogers, one of the county commissioners; Mr. Crowley, another county commissioner; and there is another county commissioner. It will be a total of five, I think. They will be very short, however, so that it won't take very long, at all.

The Court: Do you gentlemen think we are going to be able to complete this matter tomorrow? The reason I ask it that maybe I could hold a rule day Saturday. Have those calls been made?

The Clerk: No, I haven't, your Honor please.

The Court: Haven't phoned them yet. Now, if of a certainty we can finish tomorrow afternoon, so we wouldn't run into Saturday, at least too long on Saturday—we might hold half a day Saturday—I would like to have my rule day calendar and the arraignments and sentencing of prisoners in the jail on Saturday. But if this is going to take all day Saturday, too, when the clerk calls these attorneys we will postpone it until some later time.

Mr. Thomas: I feel certain enough we could finish in half a day.

The Court: That is, your case?

Mr. Thomas: Our defense, yes.

The Court: That is, just the testimony?

[fol. 247] Mr. Thomas: Oh, yes.

Mr. Oman: I am a little skeptical. We might run more than two hours in the morning, so more than an hour in the afternoon on the testimony.

The Court: You have some authorities here for me? You want to argue the law?

Mr. Thomas: We have some authorities.

The Court: It may be I shall want you to take the testimony of these old people down there. You have some old people whose names were given to us today. Maybe these witnesses will think of some others. Unfortunately, Mr. Oman, Mr. Patterson has died. He was the attorney in

the matter that was pending before this court starting back, I think, in 1950.

Patterson had some photographs down there of these old rock hogans and other things that tended to show the substantial character of the improvements at Sakezzie's place and perhaps other places, and I should think you ought to get in touch with his office and obtain the exhibits he had collected, which he was prepared to submit to the court. And there may be other matters there that you ought to obtain.

So I make that suggestion to you. I saw some of those photographs, and I haven't seen the photographs we have received here, but Patterson had some, I should think you would want them. Patterson's associates may have some other material for you, too.

Mr. Oman: I have been through his files just before he died, your Honor.

The Court: How about the photographs?

Mr. Oman: I saw them. I was unable to identify what they were. I had no one to——

The Court: These fellows will tell you.

The Court: You better get hold of the photographs and bring them over here. We will find out about them. And any other things he has got there, you look into that.

[fol. 248] The Clerk: Or Mr. Tangren might be able to tell you.

The Court: We will recess until ten o'clock tomorrow.

Little Wagon, testified as follows, through the medium of an interpreter:

Direct examination.

By Mr. Oman:

Q. Are you one of the plaintiffs in this action?

A. Yes, sir.

Q. You live down in Montezuma Creek?

A. That is right.

Q. Are you acquainted with the area in dispute in this action?

A. Yes, sir.

Q. Have you lived in that area, Little Wagon?

A. Yes, I have lived there, but I have been forced to move off there at the present time.

Q. How long had you lived there before you were forced to move off?

A. Forty-seven years ago.

Q. Did you run livestock in that area all those years, Little Wagon?

A. Yes, I ran livestock in that area, sheep.

Q. Little Wagon, did you lose any horses about a year ago from this area?

A. I lost five, and a brood mare next year; the brood mare I kept for breeding my horses.

Q. Lose any burros?

A. I own one burro, but I still have that.

Q. Little Wagon, did you find those horses after they had been taken out of this area?

A. As I stated, I live on the Navajo Reservation. After I have been driven back over that line I have been taking care of my horses, and one morning I turned them out to graze and it was a rainy day that day. You could distinguish the track mark of those horses, where they went, and I started to follow them.

Took the trail and went back, was going back into the disputed area where they were raised, and when they were en route I could see where a car had met the horses, and I seen the track where the horses were taken with either a truck or pick-up, and were driven on farther, and were put in a corral. And then while I still was pursuing, I [fol. 249] thought to myself, it wouldn't do me any good to go up there and contact this man who has been picking up the horses—I don't understand his language, neither does he understand mine.

So, in order to see about my horses I had to turn back to Hatch's trading post at Montezuma Creek, and there I asked the assistance of Mr. Hatch. And it was after another day we went over there and contacted them. These men both and Mrs. Hatch went along with me, assuming I will get my horses back, so I put my saddle into their car to ride back and drive my horses home. And when we went

to contact these men at Blanding, where the horses were penned, I asked through Mr. Hatch to have those horses released to us.

And the man in charge of them, impounding the horses, told me I had to pay a fine of sixty dollars a head for them, which was beyond my means at best. So we just returned home without my horses. I just wept about my horses there, because I couldn't do anything about it, being a victim of circumstances there, that I have to cry and return home without my horses I had all these years.

Q. Little Wagon, who was this man? Did you know him, the man who had your horses?

A. We called him a range rider—Dee Black. He is the man that has been impounding horses.

Mr. Oman: I think that is all.

Cross-examination.

By Mr. Thomas:

Q. Did Mr. Hatch tell you that Mr. Black would have to talk to Mr. Kinnaman about releasing these horses?

The Interpreter: I don't understand the question.

Mr. Thomas: I will withdraw that, and reframe it.

Q. Did Mr. Black say you would have to talk with Mr. Kinnanman before he could release these horses?

A. That is correct.

Q. Did he tell you what Mr. Kinnaman said?

A. That is right.

[fol. 250] Q. Have you known Dee Black for a long time?

A. Yes, I know him all his life, since he was this high. (Indicating).

Q Are you represented on the Navajo Tribal Council, Little Wagon?

A. No, sir.

Q. What kind of horses were these that you lost at that time?

A. It was a nice set of horses to my mind. They were all young mares, four years of age.

Q. Did you talk with Mr. Kinnaman about getting these horses?

A. No, I didn't.

Q. Little Wagon, is part of Montezuma Creek within the Indian Reservation, that is, the latest extension of the reservation?

A. Yes.

Mr. Thomas: That is all.

Redirect examination.

By Mr. Oman:

Q. Little Wagon, were these horses of yours branded?

A. Yes, sir.

Q. Do you have a personal brand that you used on your livestock?

A. This brand that I have reference to is a recorded brand from the state of Utah.

Q. Is that the brand you had on these mares?

A. It carries that brand on the left leg, on the thigh.

Mr. Oman: That is all.

Recross-examination.

By Mr. Thomas:

Q. This brand was not recorded at the time these horses were picked up, was it, Little Wagon?

A. Yes, it was valid at that time.

Q. Was it recorded?

A. Yes.

Q. Isn't this the brand that Dee Black had recorded for you just the other day, in this month?

A. I had it recorded since ten years ago.

Q. Will you ask him if that is the same brand that he had Mr. Black record?

A. Yes, that is correct.

Q. Did you ask Dee Black to have that recorded for you, Little Wagon?

The Court: You have covered that. My goodness, how much more do you want to ask about that? He told you all about it. You have pursued that far enough.

[fol. 251] Mr. Thomas: That is all.

The Court: We haven't covered, Mr. Oman, the matter of where this man was born, his father and grandfather, how long he has lived in the area from which he was driven, whether he had an allotment on the reservation. All of those things you have not gone into.

Mr. Oman: I didn't do that purposely, your Honor. I have pretty well covered it with the other witnesses, and didn't intend to burden the record with each of the witnesses on this same thing.

The Court: I think we ought to cover them, every one of them.

Mr. Oman: All right, I shall proceed to do that.

Direct Examination.

By Mr. Oman (resumed):

Q. Little Wagon, just tell us in your own words where you were born and how long you have lived in this disputed area.

A. The place of my birth is where the Montezuma Creek joins the San Juan river, from there up this way, and I have stated that I have lived in this disputed area for the last forty-seven years But the place where I was born is in that neighborhood, right in that same area, in this disputed area. And just recently we were forced to abandon that place, but our horses were born and raised there; they naturally wanted to come back on the hills where they were raised.

Q. Tell us in your own words, Little Wagon, if you know, where your father was born, what he did to earn a livelihood, and if he made use of this disputed area.

A. My father and mother were both, as I related their story, they were born in this disputed area, more up this way, more north of where I am relating my story. Now they are both dead. They died on the same area.

The Court: You remember how we proceeded with this yesterday. Now have him tell us what the old people say in his family about whether his grandparents and great-grandparents—whether the families lived there for a long time, and how long do they talk about the old people.

A. I have a very faint recollection of my grandfather and [fol. 252] grandmother. And they said they have lived all

through their life in this disputed area, and that Montezuma Creek area, and they used to tell us when these other warring tribes comes upon the Navajos, they used to drive along these bluffs, way down to Navajo Mountain area, and farther beyond, on the north side of Grand Canyon. That is where they used to hide from their enemies. That is the way my grand-people has related their story to me.

The Court: Does he have an allotment on the reservation?

A. No, I don't. I was on this upper end all the years that I have lived.

The Court: Go ahead, Mr. Oman.

By Mr. Oman:

Q. What kind of livestock have you been running in this area, Little Wagon?

A. All my life I have been livestock operator—sheep, goats, cattle and horses.

Q. Can you tell us how many sheep and how many goats you own today?

A. I have a small family now. I think everything I have is only one hundred head now.

Q. Is that sheep and goats?

A. That is correct.

Q. Do you have a family, Little Wagon?

A. I have one daughter and five grandchildren out of this daughter.

Q. Do they live with you?

A. That is correct.

Q. Did your family use these horses, Little Wagon?

A. That is correct.

Q. Have you ever seen any of these horses since you found them up in the corral at Blanding?

The Interpreter: I don't understand that.

By Mr. Oman:

Q. Have you ever seen any of these horses since you found them up in the corral in Blanding?

A. That is the last that I saw of my horses, at Blanding.

Q. Just tell us in your own words what has resulted from the loss of these horses to your grandchildren and your family and yourself.

A. We openly cried because of the loss of our horses, especially the children. One of the mares we lost was a very gentle horse. More or less the children favored that horse, because it is so gentle they could mount the horse [fol. 253] any place. If they need some water, they go and get a little water can and go after the water.

Q. Do they still feel badly about these horses they lost a year ago?

A. That is correct.

Q. Will you describe for us in your own words, Little Wagon, your family life now compared to what it was when you owned your horses—getting your water and your wood, gathering your pine nuts, and everything about it?

A. As I stated, we have experienced a lot of hard times since we lost our horses, which constitutes our livelihood on the reservation. It is hard to get our water supply; much harder for getting the wood supply, and going about places for other necessities. And if need be, we get our horse meat for our living. That is like, I think, a hog; a hog is food to the white man. Horses is also a food to the Navajo Indian.

Mr. Oman: I think that is all.

Mr. Thomas: That is all.

IRA HATCH, testified as follows:

Direct examination.

By Mr. Oman:

Q. Will you state your name, please?

A. Ira Hatch.

Q. You have heard the testimony, have you, Mr. Hatch, in this case?

A. Yes, sir.

Q. Do you speak Navajo?

A. Some.

Q. Are you the party who is referred to as the operator of the Hatch trading post?

A. Yes, sir.

Q. How long have you been operating that trading post, Mr. Hatch?

A. Since 1929.

Q. 1929?

A. Yes, sir.

Q. Are you acquainted with each of the plaintiffs in this case?

A. Yes, sir.

Q. How well acquainted with them are you?

A. Well, I know them all very well.

Q. Do you trade with them frequently, Ira?

A. Most every day.

Q. Do you buy the products they have to sell from them, Mr. Hatch?

A. Yes, sir.

Q. What does that include?

A. They have their wool in the spring, and they sell their [fol. 254] sheep herds, goat skins and their lamb crop in the fall, and some cattle.

Q. They raise no crops, is that correct, Mr. Hatch?

A. That is correct. Small gardens here and there; don't amount to much.

Q. Just the garden product which they consume themselves?

A. Mostly during the summer and fall.

Q. Are you, Mr. Hatch, acquainted with the livestock that these plaintiffs have operated all these years?

A. Yes, sir.

Q. Are you acquainted with the area in which they have grazed their livestock?

A. Yes, sir.

Q. Will you tell us about that—what kind of livestock these people have grazed, how they have operated them, and where, to your knowledge, they have been operated in this period since 1929, that you have known them?

A. Y'all, 1929, they was scattered over the area from Butler Wash, as far as I know.

Q. Where is Butler Wash.

A. Butler Wash on the west and the Colorado line on the east, north of the San Juan river.

Q. Tell us where Butler Wash is with reference to Blanding.

A. Butler Wash is about six or eight miles west of Bluff City; runs right along up that comb reef.

Q. Runs to the north?

A. Runs to the north, up towards the mountains there; the barrier.

Q. To a point about how far north were these Indians?

A. I wasn't too well acquainted with them down in there, although I know this Jim Joe outfit had run in there.

Q. The area you have described goes as far north as the town of Blanding, then easterly along the reef to the Colorado line?

A. That is right.

Q. Tell us how these people have operated during these approximately thirty years you have known them, Ira.

A. Well, at that time they were scattered over this area, and they don't live close together, maybe five, ten—whatever it may be—apart.

Q. Miles, you mean?

A. Miles. They operate their livestock that way. An Indian will draw lines among themselves. One will run there, the other one runs on his country, they call it. They [fol. 255] have boundaries, have lines. They were scattered pretty well all over this country prior to the Taylor Grazing. And after the Taylor Grazing went in, they moved these Indians, all but about seven or eight camps—I am getting a little ahead.

They made some kind of deal during 1933, or 1934—I am not sure—giving them this Aneth Extension which the Indians that used this country didn't know nothing about it. That was the government agency at Shiprock and the stockmen at Blanding made this deal, giving them the Aneth Extension. Then they proposed to put them all in there, with their livestock, and take them off this public domain which had been their homes.

Q. You mean by this public domain, in what we call the disputed area?

A. That is correct. And they all went in there but these

eight families. They gave a winter grazing permit to seven of them. Sakezzie never did have one, but he stayed at his present location.

Q. In the disputed area?

A. Yes.

Q. What about Eddie Nocki?

A. Eddie stayed at—these seven families all stayed up there. The rest of them went in the Aneth Extension.

The Court: These seven families never were on the reservation as far as you know?

The Witness: Not until about the time they served these papers on Eddie and Sakezzie.

The Court: When was that?

The Witness: That was in 1950, wasn't it?

Mr. Oman: About 1950 or 1951.

The Court: You can establish that as a matter of record.

Mr. Oman: Go ahead.

A. (Continued:) The rest of them went in this Aneth Extension. Then after they started this case, the dispute about the original homes, the ones that had been in the Extension came back out to their old hogans, their establishments, and they stayed there until last summer, 1952, I believe it was along in the early—either early September or August.

[fol. 256] Q. Then what happened?

A. Mr. Patterson advised me to tell them to take their livestock back inside until after this disputed area had been settled.

Q. Did he tell you why it was necessary, Mr. Hatch?

A. The Land Management at that time was beginning to round their stock up for trespassing, and to keep down trouble he said for them to go back in there temporarily, until they got things settled. And that is where most of them are now, outside of half a dozen camps that formed up around the artesian wells about two miles north of that, on Montezuma Creek. And Sakezzie is still out.

Q. He never did go in?

A. He never did go in.

The Court: Did these Indians enter into any agreement with the agency at Shiprock or the livestock men at Bland-

ing or anybody else about going into the Aneth Extension of the reservation they extended at that time, you say back about 1933?

The Witness: I believe they did make an agreement one time—they didn't know what they was doing—I can't recall—I think that was about—I don't know exactly when that was. It was in either 1935 or 1936.

The Court: Who made that agreement, if you know?

The Witness: The Blanding stockmen—Monticello and Blanding stockmen, and some of the government officials were there.

The Court: Where was that?

The Witness: At the trading post.

The Court: What happened on that occasion?

The Witness: They had these Indians that were out, there was about fifteen—less than twenty—around twenty—sign an affidavit to say that they would stay in this Aneth Extension.

The Court: Were any of the people who are plaintiffs in this lawsuit among those Indians who signed that, or do you know? If you don't know, you say so.

The Witness: I couldn't say whether they are or not. I know they had some younger fellows, that didn't know [fol. 257] what they was doing—under age. One or two of them signed that.

The Court: Your recollection is, only one or two of those signed it?

The Witness: One or two of them.

By Mr. Oman:

Q. Mr. Hatch, were you acquainted with the horses that these fellows have owned during the years about which they have testified?

A. I know they have the horses. I don't know them individually.

Q. Do you know where those horses were raised?

A. That is right.

Q. Were they originally Indian stock horses?

A. Oh, yes.

Q. They had come down to them from their ancestors?

A. Those horses, they are about the only kind of horses they can keep in that country. They are acquainted with

the range. They don't have hay and grain to keep a horse up. He has got to manage for himself. Their horses, they can turn them out, use them and turn them out; they don't run off. They are right there when they need them.

Q. What about their ability to live and survive in that range as compared to the horses that would be brought in there, horses that have been fed hay?

A. That is where the trouble comes in. They are adapted to that country. They can live the year around there. Bring in a new horse, he either runs away or dies from hunger.

Q. In your experience, Ira, have you actually seen horses brought in that have not survived?

A. I have seen them die, yes, now and then. They either run away or die from hunger.

Q. But these Indian horses, you say, will survive and do through the years?

A. That is right.

Q. You are acquainted with horses, are you, very well—you use them in your work?

A. Yes, sir.

Q. You run livestock, do you not?

A. Yes.

Q. And have a place in Colorado, besides this one at the post?

A. Yes, sir.

Q. And use horses continually?

A. Yes, sir; saddle horses.

[fol. 258] Q. Will you tell us what you know about the endurance of these horses as compared to other horses?

A. Well, under the circumstances, like I said, the only stock that can stand up under the situation in that locality.

Q. What about their ability to pack a man for a long distance without food and water, compared to other horses?

A. Well, I think according to size and all they are a little bit more substantial than an American horse.

Q. Did you know about the loss by these people of their horses?

A. What is that?

Q. The loss of their horses a year ago?

A. Oh, yes.

Q. They continually told you, I guess, from day to day, just what additional horses had been lost or taken?

A. That is right. They were losing them all the time. I didn't keep track of anything like that, but there was horses hauled by the store every day or every other day—whenever they gathered a band.

Q. Do you know who was doing that?

A. The Land Management—Dee Black and Mr. Robert Krumm.

Q. Did you hear the testimony of Little Wagon about his horses?

A. I did.

Q. Will you go ahead and tell us in your own words about that experience?

A. On or about the 24th of September a year ago he came to the store along late in the evening, and told me his horses had been gathered. He wanted me to take him right up to see if he could get them back at that time. It was late, so I had him stay over night. Early the next morning we put his saddle in the car. We got up there about nine o'clock. We went directly to Dee Black's home. He and Mr. Krumm had a horse loaded in a pick-up, and was getting ready to take it, I guess, for a day's work. I told him Little Wagon had lost some horses and we had come to see what we could do about it. So Dee Black said he would go in the house and telephone Mr. Dale Kinnaman and find out what was against the horses.

Q. You mean how much money?

A. How much money it took to redeem them. So he did that, and he came out and said Mr. Kinnaman told him sixty dollars a head he would let him have them back. So—of course that was beyond reason. The Indian didn't have [fol. 259] the money, neither did I. So we let it go for the time, went on back without them.

Q. Ira, have you talked to the old people who live in this area? Do you know Caroline?

A. Yes, I know Caroline.

Q. Was she there when you first came there?

A. She was there.

Q. Did you observe that woman's age at the time you came there? Can you tell us about what age she appeared to be then?

A. Oh, that is pretty hard to do. Seems like they live close to nature, but they hold their age pretty well.

Q. Do you have any opinion as to what her age is today?

A. I think she is around eighty-five.

Q. Have you talked to these old people as to where they and their ancestors have lived?

A. Well, I haven't went into detail with them on that. I have noted where they live, themselves, all over this disputed area; was there when I went down there, and up until the time they was disturbed—put out of there.

Q. You have heard their testimony as to their needs for horses in this area, and particularly in the kind of work they do. Will you tell us what you have observed as to their need for these horses and how their life is affected by not having the horses?

A. Well, in that country down there they don't have cars, anyway they couldn't use them if they had them. The way they have their sheep camps scattered and all, a horse is necessary to carry on their livestock operations, and get one broke so they can pack water and wood and groceries, and sometimes a squaw and a papoose. It takes from three to five years to get one gentle enough where they can depend on them.

Q. Tell us about instances of which you know—for instance, Caroline—does she ride a horse even at her age?

A. She has a burro she uses continually, every day.

Q. She rides it every day?

A. Every time.

Q. Tell us about that particular burro, if you know him—how this old woman can manage that animal.

A. It takes very little feed to keep it up, and she keeps it tied up most of the time. She comes to the store, either [fol. 260] feeds him a little oats or a little handful of hay. That is her only means of transportation. She can pack her groceries or whatever she has on this burro.

Q. What about him ever leaving—can she leave the burro stand wherever she wants him, and be sure she will find him there when she comes back?

A. I think so, yes.

Q. There is an old crippled man there I have noticed. What about a horse for him? Have you observed his use of a horse?

A. Well, he also has a gentle horse. They help him on, and he rides. He is crippled. He has arthritis, his legs draw up under him, so when he sets on a horse it puts you in mind of a jockey on a race horse. But by tying a rope to the saddle horse, with a little help he can get up on there. He is a real gentle horse.

Q. Do they have an Indian horse broken so this old man can go about and visit throughout the area?

A. That is right.

Q. Can't get off this horse or on it, is that right?

A. That is right. He has to have some help.

Q. You have told us how you are acquainted with horses. Is that an unusual animal, to handle a man as that one does, this crippled person?

A. Well, it is unusual, yes. But they have a lot of them they depend on that way. All their stock, wagon teams and such, they understand their ways, and they can get along with them all right.

Q. When you first went there, Ira, you became acquainted with these plaintiffs and with the other Indians that were living in this disputed area?

A. That is right.

Q. Did you become acquainted then with the number of livestock that these people were operating?

A. Yes, I knew fairly well about what they always had.

Q. In fact, you are continually trading with each one of them, aren't you?

A. Yes, sir.

Q. Buy their lambs, so you know about how many sheep they run. Buy their cattle, so you know about how many cows they have. Is that right?

A. That is right.

Q. And you have kept acquainted with these people down there all of these years since 1929?

A. Yes, sir.

Q. Can you tell us how the number of livestock these people own today compares with what they had when you [fol. 261] went there?

A. Well, when I went down there in 1929, the records I think showed around thirteen thousand sheep and goats.

Q. Now what is the number?

A. Today they have around three thousand.

Q. What has been the situation with relation to cattle?

A. Cattle has went down also.

Q. About the same proportion?

A. About the same.

Q. Now what about horses?

A. Well, they have about held their own with the horses until they gathered—made this roundup of them a year ago.

Q. They had about the same number of horses all the time?

A. About the same number, as far as I know.

Q. Ira, has your contact with these people been as frequent since the horses were taken as before they were taken?

A. Oh, yes.

Q. You have observed them?

A. I have been around them all the time.

Q. Their families?

A. Yes.

Q. Talked to them about it, I guess, many times?

A. I have talked about it. I never went in detail much about it, only I know it hurt their feelings, their taking them away.

Q. Can you elaborate on that in any way, how you observed it hurt their feelings?

A. I would rather not go into that. You have got it.

The Court: We have got that from the people themselves.

Mr. Oman: I believe that is all.

Cross-examination.

By Mr. Thomas:

Q. Where is your trading post, Mr. Hatch? Is it on this disputed area?

A. Yes, sir.

Q. And did you establish your trading post in 1929?

A. The trading post has been there I guess for seventy-five or eighty years.

Q. So it had been established before you went there?

A. Yes, sir.

Q. When you went there in 1929 did you become acquainted with Sakezzie?

A. Yes, sir.

Q. Was Sakezzie living where he now lives at that time, do you remember?

A. Yes, sir.

[fol. 262] Q. Did he have this rock building that he now has?

A. No.

Q. When was that built, do you remember?

A. I couldn't say exactly. But he may have built that. I couldn't say just when it was built.

Q. Was it within the last maybe fifteen or twenty years?

A. Yes, sir, I would say that.

Q. But at the time you went there in 1929 I believe you stated that the Indians were scattered out all over this area?

A. That is correct.

Q. Approximately five to ten miles apart?

A. Yes, sir.

Q. Was it at your trading post where this agreement was entered into that you referred to as having taken place in 1935 or 1936?

A. Yes, sir.

Q. Do you recall which white men were present, Mr. Hatch?

A. No, I couldn't.

Q. Well, would you remember whether Leland Redd was present?

A. No, I couldn't say that.

Q. You are acquainted with him, are you not?

A. Yes, sir.

Q. You are not sure whether he was there or not?

A. I am not sure.

Q. How many Indians do you recall were there at the time and entered into this agreement?

A. Somewhere around less than twenty. I don't know whether fifteen or seventeen.

Q. Did they have an interpreter there at the time?

A. I couldn't say whether they did or not.

Q. Did you enter into the agreement also?

A. No, I didn't.

Q. Now, I direct your attention to the Little Wagon epi-

sode, Mr. Hatch. I believe you stated it took place on September 24th or the following morning after that?

A. Thereabouts. I never had no occasion to set the date down. I am just telling you how it happened.

Q. You say Dee Black told you Mr. Kinnaman had stated there was sixty dollars against each horse?

A. Yes, sir.

Q. That you would have to pay sixty dollars, or the Indian?

A. To redeem the horses; that is correct.

Q. Didn't you say, "The horses are not worth that much"?

A. I didn't say nothing about that. I said I wasn't [fol. 263] situated where I could take them up for him—told the Indian that.

Q. What did you tell Dee Black?

A. I told Dee Black I couldn't put up the money. I didn't have that much.

Q. You say you didn't tell Dee Black that those horses were not worth that much?

A. How did I know what they were worth? They may not have been worth it to me; may have been worth it to the Indian. I didn't have the money to redeem them, the reason I didn't take it up.

Q. This horse you referred to as having been ridden by this crippled man, was that picked up, do you know?

A. No, sir, that wasn't.

Q. He wasn't picked up?

A. No.

The Court: Where does this fellow, Dee Black, or this fellow Kinnaman, get any authority to exact sixty dollars a horse from each of these Indians?

Mr. Thomas: I don't know, if Your Honor please.

The Court: I don't know, either.

By Mr. Thomas:

Q. During your experience down there since 1929, Mr. Hatch, have you bought and sold and traded horses with these Indians?

A. No, that is one kind of livestock that I don't have nothing to do with, the horses.

Q. Do you know whether or not the Indians trade and buy and sell horses?

A. I do; they trade among themselves; trade sheep and cattle; switch their horses around some.

Q. Do you know anything about the horses on the Indian Reservation?

A. No, I don't.

The Court: Take five minutes recess.

(Recess.)

Mr. Thomas: No further cross-examination.

Re-Direct Examination.

By Mr. Oman:

Q. Ira, when you first knew Sakezzie did I understand you to say he was living in the same place in which he now lives?

A. In the same place, yes, sir.

Q. Did he have a hogan there at that time?

A. He had a hogan and other buildings.

[fol. 264] Q. And the only thing he has built since you were there, in the way of living quarters, is this rock hogan?

A. This rock house he has.

Q. Do you know about that reservoir he has built right behind the hogan?

A. Yes, sir.

Q. Do you know who built that?

A. Well, Frost Blaek started it.

Q. Do you know whether he was working for Sakezzie?

A. He was working for Sakezzie.

Q. Did Sakezzie have his little corn patch there when you first went there?

A. Yes, sir, at the start, Sakezzie started this reservoir with a team, and got it up to where he could do some irrigation with it. And this Frost Black was down in this locality with a bulldozer, so Sakezzie hired him to do some work on that. I think it was three hundred and sixty dollars' worth.

Then later on he got another bulldozer—Ralph Hunt—he put some more work on it. I don't know just exactly how much, but it was in the neighborhood of four hundred dollars. Then later on he had Frost Black finish it, where it is today.

Mr. Oman: That is all.

Mr. Thomas: Nothing further, Your Honor.

Colloquy Between Court and Counsel

Mr. Oman: I have here the two young men, Sam Chee and Dan Chee, who was with Tom Jones, who testified yesterday.

The Court: I suppose you people could agree, couldn't you, that these two Indian boys would testify to about the same thing that Tom Jones testified to?

Mr. Thomas: I think so. I don't recall Tom Jones, but I will be willing to——

The Court: He is the young fellow that came out that morning and looked for Sakezzie's horses, followed the trail down to where those fellows were loading them into the truck, and then Leland Redd saw the Indians come and went into town and got a bunch of fellows to come out with [fol. 265] their guns, and these Indian boys withdrew because they were afraid of the guns. I believe that is about the testimony.

What are their names? Sam Chee and Dan Chee.

Mr. Thomas: We will so stipulate.

The Court: The Bureau of Land Management people were there at the same time, I believe he said Dee Black.

What else do you have?

Mr. Oman: I also have the other women who were present with Ethel Sakezzie. I would suppose if they were called they would testify substantially as she did. I think you will so stipulate.

Mr. Thomas: Is that the case of——

The Court: That is the handcuffing, where these fellows from the Bureau of Land Management went down there and handcuffed these squaws together and drove off their sheep.

Mr. Thomas: What are their names?

Mr. Oman: Jane Ben and Mrs. David Yazzie. May that be stipulated, Mr. Thomas?

Mr. Thomas: Yes, we will stipulate to that, with the reservation, of course, that it immaterial, as we objected before.

The Court: All he is asking you to do is to stipulate they would testify to the same effect that the witness Ethel Sakezzie testified.

Mr. Oman: I have a considerable number of these additional plaintiffs, some of them old men, about as old as those who have already testified. Their testimony would be substantially as that covered by Sakezzie and Hatahley. To save time, I propose that if they were called their testimony would be substantially as that given by Sakezzie and by Bill Hatahley. It will take us a great time if we have to take each of them, but of course I am willing to do so if Your Honor believes it ought to be done.

The Court: Well, what about the stipulation?

[fol. 266] Mr. Thomas: Of course Sakezzie had these particular horses—I believe we could stipulate, if Your Honor please, that these Indians would testify as the others have done, that some of their horses were lost——

The Court: They were not lost. Let's be clear about this. They wer not lost, at all. The evidence is perfectly clear that the Bureau of Land Management representatives Dee Black and a fellow named Krumm, together with a number of livestock people, white men down there who wanted to drive these Indians off the range, went around and herded up, rounded up these Indian horses and trucked them out of the country and sold them to a glue factory for two cents a pound and kept the money. Don't tell me those horses were lost. They weren't anything of the kind.

Mr. Thomas: Of course we stipulated here as to the number of horses taken by these agents, if Your Honor please, and the only thing, as I understand, that these Indians know is that their horses that were on there, grazing on this area, were lost to them. They don't know where they went. Some of them saw the horses, others didn't.

The Court: I don't know what their testimony would be, but every one of the men who has testified up to the present trailed his horses and found them in Dee Black's possession. I suppose these other witnesses would make connection, is that correct, Mr. Oman?

Mr. Oman: I don't believe each of them trailed their horses. They knew that was going on, saw the horses trucked past the trading post almost daily—the amount of money they claimed had to be paid. Some of them didn't follow them up.

The Court: They saw them hauled off, you say, past the trading store, is that right?

Mr. Oman: Yes.

Mr. Thomas: Did the Indians see them hauled off? Mr. Hatch said he saw them hauled off.

Mr. Oman: Each Indian didn't see each lot of horses hauled off, but they all saw horses at various times——

[fol. 267] The Court: There is not any dispute, is there, Mr. Thomas, that you people ran off with about one hundred and fifty head of horses and burros?

Mr. Thomas: There is no dispute about that. Of course, the number involved——

The Court: There is no dispute about the fact that these people owned these horses?

Mr. Thomas: I am willing to take their statements that they did own these horses, of course. I think that is about all that has been testified to.

The Court: You have made a stipulation with Mr. Oman that if these additional Indian plaintiffs were called that they would testify about as Sakezzie and Bill Hatahley and Little Wagon have testified; that is to say, that their horses were driven off by the Bureau of Land Management, and that in all there were about one hundred and fifty horses and burros gone—one hundred and fifteen horses and thirty-five burros, I believe is the testimony.

Mr. Thomas: With the qualification, if Your Honor please, that we have the number of horses and burros, the exact number that were picked up——

The Court: I thought there wasn't any dispute about it, that there were about one hundred and fifteen horses and thirty-five burros?

Mr. Thomas: I don't think there are that many.

Mr. Oman: He said he shot nine on the range, sold one hundred and four to the glue factory. Nine of them you admit out on the range, I have forgotten the number killed in the truck. We are not very far apart on the number. The

number has been testified as one hundred and fifteen horses and thirty-five burros.

Mr. Thomas: Eight of those were redeemed.

Mr. Oman: The number sold was one hundred and four to the glue factory.

Mr. Thomas: No, one hundred and three, to Kuhni Brothers.

[fol. 268]. Mr. Thomas: I wouldn't argue about one horse. The total number is 139 less 8——

The Court: Are you going to require putting all these Indian witnesses on? If so, we will go ahead.

Mr. Thomas: N ; if we could determine this now it would obviate the necessity of putting on direct evidence to figure out exactly how many were involved.

The Court: If that is raised, maybe you can work this out during the lunch hour. Is there anything else we can do before that time?

Mr. Oman: I subpoenaed a man to come in here as an expert on the damage element. I don't see him in here. I told him I doubted if we would get to him this morning.

The Court: Yesterday I told you I would tell you the name of a place. The name is B-o-s-q-u-e R-e-d-o-n-d-o. The Bosque Redondo was the roundup of the Navajos in 1868, when the United States Army rounded up the Navajos in New Mexico and Arizona and took them to a place that is about forty miles square, in the center of which stands Fort Sumner.

They had about ten thousand when they got through. They rounded them up by force. The army went out and did it.

The United States government offered a bounty on the head of the Navajo men and women. They destroyed their fields and their crops and their animals to coerce them to come into that place, and they did a very thorough job.

The United States Army employed a fellow whose name you have all heard, to carry on the operation. It was Kit Carson, the famous scout who lost his life at the Alamo in Texas later on.

Kit Carson was in the employ of the Army, and headed up that campaign. A most thorough job. They drove them into that area and in a little valley forty miles square the

United States government tried to set these people to work to till the soil, to make some kind of a living—people that were not agricultural people at all, people that were herders, had been herders for centuries. Of course it didn't work. [fol. 269] In the month of June, 1868, they abandoned that idea. And it was at that time that the Navajo Indian Reservation was established, and these people permitted to go back out to the area where they had theretofore lived, and return to their flocks and their herds, and the only way of life they knew.

Now, that is the Bosque Redondo that some of these Indians referred to yesterday in their testimony. And I wanted to get that exact—the name exact.

This area called the Bosque Redondo was about forty miles square. I mention that episode for a reason that is important here, and that is that these people who are plaintiffs in this lawsuit reside north of the Colorado river; they have always resided north of the Colorado river. They reside north of the San Juan river. They have always lived up there.

The testimony here is that it ... the tradition in the families, the old folks have passed the word down, that for generations they have lived at this place.

Now, the importance of the location is that these people were not rounded up at the time of the Bosque Redondo, and for very important reasons of geography. The Colorado river is a barrier. It is a barrier that in those days folks could not get over. These people were up to the north.

These people's traditional enemies, as they testified yesterday, have been the Utes, the Ute Indians. They carried on wars with the Ute Indians, the witnesses testified yesterday.

This is all part of the unwritten law of these folks. It is also written history of the Southwest, if you want to read about it.

At the time of the Bosque Redondo the United States Army enlisted the help of other Indian tribes to run these people down, and of course the reward of the others was the plunder, their flocks and horses and so forth.

Well, now, it is of some importance here in thise case to observe those facts. They are facts of which the Court takes judicial notice, because they are historical facts, geo-

[fol. 270] graphical facts, that these people had a great natural barrier in the Colorado river and in the San Juan river, and in that desolate region, that whole desolate, rugged territory down there in the Four Corners area.

That barrier has kept them there. They claim their little band has always been there; that they did not participate with the others in the Bosque Redondo.

Sakezzie had something to say about that yesterday; their claim is they did not participate in the negotiations of the Navajo people with the United States government out of which grew the treaty which founded the Navajo Reservation.

Now, these things are hard to establish, because we don't have written records. But the geographical facts tend to support their statements about that.

As a matter of fact, that Colorado river is still a great barrier—those great gorges down there. These people didn't travel across those things. People down below didn't travel up there to a great extent.

That corroborates, it seems to me, their claim that they were not rounded up in the Bosque Redondo, and that they were not represented in the treaty negotiations; that they never did get into the reservation until last year or a year or two ago, when the United States government again started to drive them from their homes.

Now, we will take judicial notice in this case of some of those geographical facts, some of those facts of history down there.

When Escalante came through this country in July of 1776, his little band tried to get across that great river. They couldn't do it until they had gone quite a long way up the river, as you know—up to a place we know about as the Crossing of the Fathers, down in the area south of these people who couldn't get across that river.

Those gorges are a terrific natural barrier. The United States Army, and Kit Carson, and the rest of them had a tough enough time rounding them up in the plains of New Mexico and Arizona, without coming up here. There is no [fol. 271] evidence that anybody ever came up here and rounded them up. I don't think you will find any evidence in history of that.

Last night I spent some time looking up this matter.

Well, those are some things that you ought to give your consideration to, also. And fundamentally, gentlemen, this is not a problem for a court. You never are going to solve this problem by having each dispute, when they are in a controversy, brought here or to some other court for settlement. Each one is just an isolated controversy, and you scramble around with it, and you don't solve anything.

It is a lot more fundamental than that. These folks are wards of the United States government. The United States has set up a reservation that I am told is not adequate for their needs. There are around fifty-five ~~or~~ seventy thousand people down on that Navajo Reservation now, those barren wastes that seem to me not to produce forage enough to keep a goat alive—yet they somehow manage to keep their little flocks there.

There is just a natural pressure on those people to get off that area, even if they themselves stay on it and have their livestock trail off of it—as the evidence yesterday indicated. And the natural pressure comes from the will to live. They have to eat and to survive, and they or their livestock crowd off of the places in order to live on the fringes—that is what this is, one of the fringes of the Navajo Reservation.

You are bound to have conflicts between the white livestock men who have permits under the Taylor Grazing Act, and these unfortunate people who have very little down there, and are trying to eke out an existence. You are just bound to have those conflicts. And it is not going to solve anything to just keep on bringing each one as it arises, before a court, it seems to me. I don't believe this is the place.

I am going to settle this controversy as far as this Court is concerned, as best able I am—but that is not all I am going to do about it. We are trying to get at a solution of the more fundamental problem here.

[fol. 272] In the first place, before this is over, I am going to enjoin the white folks down there from carrying on these depredations against the Indians. And it will be a pleasure to deal with any violator of that injunction who is brought here, I'll tell you that.

On the other hand, before this is over, Mr. Oman, I am

going to charge the Indians down on that reservation that they are not to do what they did in 1950, when Knox Patterson apparently told them they could return from the reservation.

Now, I am not going to have any injunctions on these people like that. There are a few families here—Mr. Ira Hatch, the man who keeps the trading post at Montezuma Creek, testified a bit ago that there are seven or eight of those little families that have always been there; they have never gone back; this is their home.

Even when they were chased back on the reservation last year—it is not proper to say "back" on the reservation—they have never been there, to live. When they were chased over on the reservation last year, their livestock, accustomed to living in this disputed area, trailed back up there.

Then the Bureau of Land Management killed them off.

Well, there is one thing I wanted to talk with you about, Mr. Oman, and that is, each one of these owners of a horse, all of these owners who have had their horses taken away from them and killed, may put a value on them. He doesn't need to be an expert. An owner of property can testify to its worth, its fair market value. I don't know whether they would understand what "fair market value" is—but I am going to let them testify here as to the worth of those animals.

And of course you have some element of damage here other than the loss of the animals. There is quite a lot of evidence indicating serious consequential damage from this wrong-doing. We are going to have to take a look at that.

Well, if it is necessary so to do, we will put on these other witnesses.

[fol. 273] Now, with respect to the tradition. I have been explaining these things to you telling you what is in my mind and what is important, it seems to me. So that if you have any testimony along the lines I have suggested, of the Bosque Redondo, and the fact that they were not rounded up at that time, that they did not participate in the formation of the reservation—and of course all they would have would be the tradition—it would be what the old folks had passed on down by word of mouth, and what was the common understanding and expression among themselves.

Now, I think that is admissible in a case of this kind, like proving pedigree. I think you should be thoughtful about that sort of thing, Mr. Oman. I have been trying to help you out along that line.

You have some old women down there who were not able to come up here?

Mr. Oman: That is right.

The Court: I think maybe I will take their testimony; one of these days you are going to lose these old people; their testimony will be gone forever. And I would like, in this proceeding, now that we have got this far with it, to take the testimony of all of the ancients, the elderly people in this little band.

It will be perpetuated here, and it can be used not only in this proceeding, but in any other proceeding, in fact, in an administrative proceeding if there be any.

Maybe we can find some solution. It is not going to be a quick solution. We are going to have to spend some time on this.

While we are at it I am going to have an injunction down there. I want you to prepare an order—I want to look at that, and let the other side look at it—I want your suggestions, both of you, on it. I do not intend to have any disturbances there, any more destruction of property.

In fact, with the running off and killing of the horses of these people, it is fortunate that you haven't had worse trouble than destruction of property. You wouldn't run one [fol. 274] of my horses off that way without having some trouble. These Indians wouldn't run off white men's livestock down there without having some trouble, too, that would have been a lot more serious trouble.

These people have been patient and long-suffering, and have shown a great restraint, it seems to me. They have been dealt with badly, it seems to me.

Well, that is my way of suggesting to you as to what I would like you to pursue. And I may suggest something to the interpreter, here.

You should talk to these people about what I have been talking about, and talk to the Council, and see if this doesn't prompt some knowledge they have that ought to be received here. Do you understand what I am talking about? We have a very good interpreter here.

There is one other thing, if we take the testimony of these elderly women I am not going to have it taken before a notary public. I am coming down there and take it myself, and I want to know where is the place to come to do that, Mr. Hatch?

Mr. Hatch: Well, come to the trading post.

The Court: We will have a court reporter, we will have the attorneys on both sides; we will have the clerk of the court, at least. That is five of us. Is there a place down there somewhere where five of us can find shelter for over night?

Mr. Hatch: I think so.

The Court: You look into that, Mr. Oman, and we will try to get at that right away. How is the weather down that way in December?

Mr. Hatch: Usually good.

The Court: Do you think we could get these people to come in?

Mr. Hatch: Yes, sir.

The Court: To some centrally located place, if the weather would permit?

[fol. 275] Mr. Hatch: Yes, sir.

The Court: I want to get close to them, because they don't have any horses any more; there is a problem about transportation.

You arrange the place, and we will try to get down right away, and get the testimony of the rest of these people.

While we have these other people here, while we have these elderly people here who know something about that country and who have lost horses, it might just as well be that we examine them; maybe we should. Let's get their testimony while they are here. It will take a little while, but it is important.

These people are human beings down there. We ought to give them some consideration.

I am very happy to tell you that I have received one hundred dollars this morning as a result of the newspaper publicity about this. Some people in this community have communicated with me, and they are taking food and clothing to these people; and I have a check for one hundred dollars, and I anticipate there will be more, which I will turn over to Sakezzie, who seems to be the leader of this group. This

is to help take care of them in any needs they have. They are up here without food and without money. This has taken longer than it should.

Well, we are going to try to help these people. I am not sure that this stipulation about what these other old people would testify to is a good idea. But you try to work it out together, and see what you arrive at.

We will recess until two o'clock.

(At this point the further hearing of the said cause was recessed to two o'clock p. m.)

[fol. 276] Afternoon Session, November 20, 1953, 2:00 o'clock p. m.

The Court: All right, Mr. Oman, go ahead.

Mr. Oman: If the Court please, I have done what I could to find out what I could about these ancestral rights from the balance of the witnesses, the plaintiffs who are here.

They generally seem to be of the opinion, although I think it would be well if they talked to their wives and other relatives there, that what Sakezzie has said represents the facts that have been passed down to them from their parents and grandparents.

I have mentioned to counsel for defendant that we are willing to stipulate with the Government that the other plaintiffs who have not yet been called as witnesses would testify, if called, substantially as Sakezzie. Bill Hatahley and Little Wagon have already testified.

I appreciate your Honor's interest in this other matter, but I am sure you know how much work it is to get into that question, and it was not one for which I was prepared when I came into this action, having restricted it to a claim in tort for the taking of the horses.

The Court: I understand.

Mr. Oman: And I would like it, your Honor, if that other element may be reserved, to give me an opportunity to go more deeply into that phase of it. In fact, we are having a lot of work done right now down in that country in the line of what your Honor has already suggested with these old people.

I have been to Mr. Patterson about the files, the former

attorney for these Indians, and we are going to go through those to see if we can find the pictures you have mentioned, but we have been unable to find them yet. They are stored down the basement, and we will need some time to go through those.

The Court: Well, we will see about that. Now there are two or three matters. How about stipulating as counsel suggests, Mr. Thomas?

Mr. Thomas: Yes, we will stipulate that.

[fol. 277] The Court: That is you agree to what counsel has just asked you to agree to?

Mr. Thomas: Yes, sir.

The Court: It will make it unnecessary to call these other folks with respect to the question of what has been the understanding of the old people, passed on from time to time, as to this little group living in this vicinity. That is all he has reference to. Mr. Oman, you have here individual plaintiffs, several of them?

Mr. Oman: Yes, your Honor.

The Court: In order to present this properly you say you have Bill Hatahley; you have Widow Sleepy; you have Charlie Burke, Lucy Harvey, Shorty Smiles, a number of them, and you claim that in all there were 150 horses and burros that were taken?

Mr. Oman: That is right.

The Court: Now, I don't believe you can just lump that together that way. I think you are going to have to get clear in this record how many of these animals each one of these plaintiffs lost, because these are individual plaintiffs, and they are each suing for their own claim, and I am afraid if it went up with a record that didn't show what horses and burros each plaintiff himself lost, why it would affect the record.

Now, that is a thing that you folks ought to be able to agree to. You have agreed to somewhere between 138 and 150, as I understood it before, lumping them.

Mr. Oman: 138, yes.

The Court: You are ready to agree to 138. Now, it seems to me that you two counsel ought to be able to sit down with the interpreter and these people and find out how many Sakezzie lost. I guess we have already got that. And

Bill Hatahley, I guess we have got that. Little Wagon, I guess we have got that.

Now, it is going to be too bad if we have to call each of the rest of these plaintiffs and ask them how many each one here lost. Can't you folks agree to that, as to how they were split up between the respective plaintiffs?

[fol. 278] Mr. Oman: I have that information, having contacted each of these plaintiffs.

The Court: Can you submit that to Mr. Thomas and see if he is in a position to agree to that, or are we going to have to put on each of these plaintiffs?

Mr. Oman: Counsel for the Government is willing, your Honor, to stipulate that the plaintiffs, if called, would testify that the number of horses, which I will read into the record for each individual plaintiff, is the number which each lost.

The Court: Is that horses and burros?

Mr. Oman: Yes, I will show which are horses and burros.

The Court: All right, go ahead.

Mr. Oman: Billy Antez, 2 horses; Jim Antez, 2 horses; Cyrus Begay, 9 horses; Natona Begay, 3 horses, 1 burro; Allen Ben, 4 horses; Mary's Boy, 1 horse; Charlie Burke, 2 horses, 1 burro; Tom's Father, 1 burro; Jim Harvey, 4 horses; Lucy Harvey, 4 horses; Willie Harvey, 3 burros; Bill Hatahley, 3 horses, 2 burros; Jim Hatahley, 4 horses; Mary Jay, 3 horses; John Jay, 1 horse; Frank Joe, 4 burros; Danny Jones, 1 burro; Tom Jones, 5 horses, 1 burro; Fred Johnson, 1 horse; Tom Mustash, 1 horse, 1 burro; Eddie Nocki, 9 horses; Hosteen Sakezzie, 15 horses, 1 burro; Widow Sleepy, 7 horses, 11 burros.

If your Honor please, in order to clarify the record, Widow Sleepy is one and the same person as Old Lady Sleepy and Sleepy's Widow named in the complaint as three separate persons. I later found out she is known by all three of those names.

Susie Sleepy, 2 horses, 1 burro; Shorty Smiles, 1 horse, 1 burro; Mrs. Lilly Thomas, 1 horse, 0 burros; Slim Todachennie, 2 horses; Mark Tootsonian, 1 burro; Little Wagon, 6 horses; Tom Belatso, 9 horses.

The Court: Well now, how many does that add up to?

Mr. Oman: That adds up, I believe, your Honor, to 100. After I added Tom Belatso's the other day, it is 136 horses and 38 burros.

[fol. 279] The Court: Well, I guess that takes care of who owns how many animals that you claim have been taken by the Bureau of Land Management. Now, you still have the question of examining these various owners with respect to the value. Now, have you had sufficient opportunity to talk to them about that? Now, of course, we are dealing with a people who do not think about the value of a horse in terms of what we know as value, and somehow we have got to translate their term about that into our own conception, and that is what I think you ought to discuss with each other, and with the interpreter. Now, have you had an opportunity to do that?

Mr. Oman: I have had an opportunity to discuss it, your Honor, with some of the leaders of this little clan, and we are ready to proceed on that matter.

The Court: All right. Before we do, as I have said to you, some people whose hearts have been touched, I want you to tell these folks, I want you to tell all of these folks what I am going to tell you.

Some of the folks who read the newspaper about these good people, and whose hearts have been touched by this situation, have called here and asked where to send food and clothing and things to keep them warm, and also this morning I have received a check for $100.00, and I now want to turn that over to these people. I would like you to tell them that there will probably be more expressions of this kind, and I have suggested to people, and continue to suggest to them that they communicate with my office. We will clear it through my office, you see.

Now, to whom do these people want me to turn over the check? To whom do they want me to turn over the money?

The Interpreter: I think the best thing to do is to turn it over to Mr. Ira Hatch. He is a man that knows us personally and knows our needs, and I think he is the best man to receive those gifts.

The Court: That is what they want done, is it?

The Interpreter: Yes, sir.

The Court: All right.

[fol. 280] Mr. Oman. If your Honor please, there is a matter I overlooked when Mr. Hatch was on the stand, but he is

one of these people, a member of the Navajo tribe, of Indian blood himself.

The Court: All right.

(Demonstration by Indians.)

The Interpreter: They would like to express their gratitude to these good people who donated this money and things for their well-being.

The Court: Go ahead. All right. Thank you very much, I am sure. Go ahead.

Mr. Oman: I would like to recall Hosteen Sakezzie.

HOSTEEN SAKEZZIE, recalled as a witness by the plaintiffs, having been previously duly sworn, resumed the stand and testified through an interpreter further as follows:

Direct examination.

By Mr. Oman:

Q. Sakezzie, you have already testified in this trial yesterday and the day before?

A. Yes, sir.

Q. Down in your country, Sakezzie, how do you people deal among yourselves in buying and selling horses? Will you tell us in your own words what you people do?

The Interpreter: I don't think he quite got your question.

The Court: We have a problem in a proceeding of this kind, the way we white folks conduct it, you know, and it is very strange, I know, to the Navajo people. We have to put a money value on these horses and burros which have been taken. That is to say, the plaintiffs ask for $100,000.00. Now, part of that is what they have lost by losing their horses and by losing their burros, and part of it is damages that resulted from losing their horses and burros. Now, what I would like to know, and what I have to know in the record, so that the girl takes it down and puts it in the record, so that when it goes to some higher [fol. 281] court it will be there, I have to know what is the value of those horses in money.

Now, I know that is a troublesome thing. I have been troubled, and I still am, as to how we are going to get that, because these horses are very special horses. They were born right there, as the testimony shows. They have been gentled so that they can be used for a lot of purposes. The children ride them to school; the old folks get around on them; you haul water, you haul wood on them. You use them to pull wagons. The horses are used to cultivate the fields. They also have become accustomed to the severe climate, and they have become accustomed to the drought condition, and they have learned how to find their own food. Now, all of that is in the record. We understand that, and that is fine, but now we have to try, and I don't know whether we can do it or not, but I would like to find out if Sakezzie or Antez or Bill Hatahley or Ira Hatch or Little Wagon or any of these folks can tell us about the money value of these horses.

Now, there is testimony here, on the other side of this lawsuit—it came from Dee Black—maybe you heard the Government attorney ask him how much were these horses worth, and he said two cents a pound. Now, the value of these horses is not, I wouldn't think, their value to a glue factory. These horses were being put to use by these people in their way of life. They can't live without them. They have to go somewhere else if they can't have horses. As a matter of fact there is the testimony here that in addition to all of the other uses, when they have to, when they haven't any other food, these folks eat the horses for food. They are meat for them.

Well now, surely these horses are not worth just two cents a pound. Now, I would like to find out if one of these owners can tell me what he thinks, in his opinion, is the money value of those horses to the Indian, and I feel a great difficulty about how to find that out, but you and I have got to try to find it out. You talk to them about it and explain what we want, and if there is something more that has got to be explained here, I will try to help you explain it.

[fol. 282] A. Of course, in the Navajos, we don't deal in dollars and cents like the white communities or white population. We barter on the Navajo land. That is, we pay for sheep, whatever we want to get, we pay it in cattle.

That is the way we operate our trading activities on the Navajo.

By Mr. Oman:

Q. Now, in this bartering, Sakezzie, you people trade cows for horses, and sheep for horses?

A. That is correct.

Q. And about how many cows do you trade for one horse?

A. We would pay five cows for a horse.

Q. And how many sheep would you trade for a horse, Sakezzie?

A. We usually go from 25 head to 35 head of sheep to buy a good horse.

Q. Now, Sakezzie, you do sell these sheep, and you do sell cattle?

A. Every year.

The Court: Fix the time. You see this is when the horses were lost. Get the time fixed.

Mr. Oman: I will do that, your Honor.

The Court: There is a difference in the market then and the market now for cows and sheep.

Mr. Oman: That is right.

By Mr. Oman:

Q. Can you tell us, Sakezzie, about how much money a cow was selling for a year ago?

A. We sold a good cow, of good flesh, a year ago, $200.00 a head.

Q. How much did your sheep bring per head a year ago, Sakezzie?

A. They ran around about $30.00 for a good ewe, that is a good breeding.

Mr. Oman: All right.

The Court: Now, Mr. Oman, when you are through, I will leave this thought with you. Ask him how much he would have sold all of his horses for that were taken from him at that time; how much would he have sold them for, if he had been called upon to sell them. How much money would he have wanted for them?

The Witness: I would have sold on that market basis, a

year ago, the type of horses I had, would have brought on the average $300.00 a head.

By Mr. Oman:

Q. Now, Sakezzie, you people understand what you have [fol. 283] to do to finally get back horses like those which have been taken away from you to replace those horses, you know what you have to do, and can you tell us what in your opinion it will cost you to replace those horses, at so much per head?

A. This is the way it appears to me. If we were to replace a horse it would be a brood mare. At the offset it would either be an already bred mare or a mare that has to be serviced by a stallion. Yet you will have to contend with keeping this mare for the first year, because she is not used to that type of country that we live in. We would have to purchase all its feed. Now saying, that is if we bought a bred mare, we would realize a colt the following spring, and from there on it would be fully five years before we get the use out of that colt, and as I have stated before, it will cost the owner a feed bill from year to year to raise this colt, so to my mind I think it will cost $1,000.00 before they would get to the point where they could use that horse that he intended to own.

Mr. Oman: That is all.

The Court: Well now, there is a little misunderstanding perhaps. He has said when they traded a year ago, cows for a horse, 5 cows for a horse, and a year ago a cow sold for $200.00; so that is $1,000.00 for a horse. And he said too that when they trade sheep for a horse, there is thirty to thirty-five sheep for a horse. Well, sheep a year ago were about $30.00 a head, is that true? So that is right up at about $1,000.00, you see. But then we ask another question. I am not sure that I understood that. He said something about selling the horses a year ago, if he had been selling them, for $300.00 each, so you see there is a conflict.

Now you said three things that make me think the horses were worth $1,000.00. One, he traded $1,000.00 worth of cows for a horse; two, he traded $1,000.00 worth of sheep for a horse. Third, he says after you get a brood mare and have a colt and train the colt for five years, you will

be in $1,000.00 for that horse. You see, there is a conflict between those three things, and about selling the horse a year ago for $300.00. I think we must have misunderstood about that.

The Witness: Of course, this is a normal barter trade [fol. 284] among the Navajos. That is where I base my valuation on the horse, by this other high price for cattle and sheep. We do know they fluctuate from year to year, and that is not permanent, but this is in a good-will turn, when a man is of the same accord, they like to trade, like two human beings should be. That is the thought that I had, because I brought that price up a year ago, that my horse would have brought $300.00.

The Court: Another Navajo?

The Witness: Between the Navajos. This is a barter trade among the Navajos.

The Court: Among the Navajos.

The Interpreter: If your Honor please, may I call attention to what Sakezzie had in mind? He said for a good horse he traded 5 cows and 30 to 35 sheep, and on an average, that would include everything, colts and all, they were worth $300.00.

The Court: Is that what he meant?

The Interpreter: That is right.

The Court: That is what he told you?

The Interpreter: That is right.

The Court: That is what the witness told you?

The Interpreter: That is right.

The Court: Now, of course, I was going to ask you about that. Some of these horses that were taken away from them were brood mares. I should think a brood mare would be a very valuable horse. And some of them were stallions. In other words, your breeding stock, your breeding stock is more valuable, isn't it, than just the ordinary stock? Ask him how much for good brood mares and good stallions.

The Witness: This is also true, all of the types of horses that we have, that is in good turns and good-will turns, trading among the Navajos and Navajoland, a good brood mare, a good stallion, probably a colt, they average around $300.00 a head.

[fol. 285] The Court: All right.

By Mr. Oman:

Q. Sakezzie, tell us about the burros. Is what you have said about horses the same with you people as to burros?

A. That is correct.

Q. What about jacks, Sakezzie?

A. To an Indian mind they are just about equal.

Mr. Oman: All right, that is all.

Cross-examination.

By Mr. Thomas:

Q. Sakezzie, isn't it a fact that there are many horses over on the reservation which are Indian horses of the type that you had?

A. Some of them are.

Q. Do you know, Sakezzie, that there are too many horses on the reservation range, and that the Indian Agency is paying $10.00 a head for the Indians to bring them in?

Mr. Oman: I object to it, your Honor. I don't believe that is of any importance to this man.

The Court: He is asking him if he knows. You may proceed.

A. It is my understanding that unless you actually see and witness you don't know about things.

The Court: That is a very good statement on most horses.

The Witness: This today is a hearsay. I don't know whether it is true or not.

The Court: That is the way we look at it too. That is the law of this court.

By Mr. Thomas:

Q. Have you tried to get any horses from the reservation, Sakezzie, to replace these horses?

A. Yes, of course I would like to get some good horses back, but that is just my imagination, see, but I don't know where to look for them, to obtain good horses like the kind that I lost.

Q. Have you tried on the reservation?

A. No.

Mr. Thomas: That is all.

Mr. Oman: That is all.

The Court: Wait a minute. All right, that is all.

[fol. 286] (Witness excused.)

Mr. Oman: I have talked with counsel for the defense, your Honor, and they are willing to stipulate that the other plaintiffs, if called in this matter, would testify as to these matters just covered by Sakezzie substantially as he testified.

The Court: That is to say each of the plaintiffs, if asked about the value of the horses and burros which were taken from them would——

Mr. Oman: And the cost of replacing those animals, your Honor.

The Court: —would give as their opinion the same testimony as Sakezzie has done?

Mr. Oman: That is right.

Mr. Thomas: That is as to the horses that were broken, not the unbroken horses.

Mr. Oman: He averaged up in his testimony. I say they would testify as he did.

Mr. Thomas: All of Sakezzie's horses, I understand, were broken.

Mr. Oman: He didn't testify as to his own horses here. He testified as to the value of a horse down in that area.

The Court: Maybe we had better put him back on. I want his testimony with regard to the value of his own horses, what he lost. It was my understanding that is what he was giving.

Mr. Oman: I meant to ask him.

The Court: It is my understanding he was telling us in his opinion every horse he lost would average $300.00 in fair market value in our language, at the time they were taken. Don't you think that is what he was testifying to?

Mr. Thomas: Oh, yes, yes, I think so, but his horses were broken, so he testified.

The Court: Well, were some of these horses that were taken not broken?

Mr. Thomas: Oh, yes, many.

[fol. 287] The Court: Maybe we had better have some

further testimony about that. Now, all of his horses were broken, is that the understanding?

Mr. Oman: I believe all of Sakezzie's were.

The Court: Let's have him take the witness stand again and find out about that. I want to get all the questions answered in this case before we are through, while we have them here. This is a bad problem, to get them up here.

HOSTEEN SAKEZZIE, recalled as a witness by the plaintiffs, having been previously duly sworn, resumed the stand and testified through an interpreter further as follows:

Redirect examination.

By Mr. Oman:

Q. Sakezzie, when I asked you about the value of these horses, and the Court explained to you——

The Court: Let's make this very simple. Was he talking about his horses when he gave us these values? Just ask him that.

The Witness: That is true for the first part, but I also meant for all these complaints.

The Court: He was telling about all of plaintiffs' horses?

The Interpreter: That is right.

The Court: Did he include the horses that weren't broken?

The Witness: I want the Court to understand me, that these are all broken horses, and gentle horses. In fact, most of these horses were being led by their mane or they could be handled by their tail, and how would they load these horses like they did, as easily as they did?

The Court: Yes. Well then, there is testimony here that Dee Black and the Bureau of Land Management drove off 115 horses that belonged to these people. Now, Sakezzie was telling us that each one of those horses had a value of $300.00 when it was driven off, is that right?

The Witness: That is correct.

[fol. 288] The Court: And also each of the burros and each of the jacks?

The Witness: That is correct.

The Court: Now, then, we have that cleared up. Do you want us to call each one of these plaintiffs and have them testify as to the value of his own horses, or are you willing to stipulate if all of the plaintiffs were called each would testify as Sakezzie has testified?

Mr. Thomas: We will so stipulate.

The Court: I beg your pardon?

Mr. Thomas: We will so stipulate.

The Court: All right. That is all.

(Thereupon the Interpreter spoke to the witness in the Indian language.)

Mr. Oman: With those stipulations, your Honor, the plaintiffs rest.

The Court: Mr. Interpreter, there is one question I want to ask you. Sakezzie is telling you that is the value of the horses of all of these plaintiffs and the burros of all of these plaintiffs?

The Interpreter: That is correct.

The Court: That is what he told you?

The Interpreter: That is right.

The Court: He said all of his horses were broken and the burros broken so that you could manage them by the mane or by the tail?

The Interpreter: That is correct.

The Court: Now, did he say the same thing about the horses that belonged to the rest of them?

The Interpreter: That is all the complainants?

The Court: That is the way I understood it.

[fol. 289] The Interpreter: That is correct.

The Court: He told you all the horses they lost were of that kind?

The Interpreter: That is right.

The Court: And the burros likewise?

The Interpreter: That is right.

The Court: Now, we didn't give you an opportunity to cross-examine.

Mr. Thomas: On this last testimony?

The Court: Yes.

Mr. Thomas: That is all right.

The Court: Do you want to cross-examine?

Mr. Thomas: No, I have nothing further.

(Witness excused.)

Mr. Oman: If the Court please, I did have another witness whom I expected to be here that has not come in to testify on certain elements relating to the damage. I fully expect him in the morning. I will be very glad to put him on after defendants have presented their part of the case, if that is agreeable.

The Court: Where is he?

Mr. Oman: He is here in Salt Lake, and I called his home this noon, and also the place of his work. They said they didn't know where he was, but they said he would be home tonight.

The Court: Do you folks want to go ahead with the understanding that plaintiffs may have another witness in the morning, and also with the understanding on one aspect of this case I am going to take some testimony down at Montezuma Creek? I am going down there, and going to take a reporter and you gentlemen, and we are going to examine those very old people who were not able to come up here.

[fol. 290] Mr. Thomas: I understand that this witness will be put on the stand only with respect to the market value of these horses.

The Court: No, it is another aspect of the damages.

Mr. Oman: He will be confined to the damage here in the case.

Mr. Thomas: That is agreeable.

The Court: Al right, you may go ahead then.

Mr. Thomas: We will call Mr. Dee Black.

Dee Black, called as a witness on behalf of the defendant, having heretofore been duly sworn, resumed the stand and testified further as follows:

Direct examination.

By Mr. Thomas:

Q. You have heretofore been sworn, Mr. Black, in this case?

A. Yes.

Q. Now, I direct your attention to Defendants' Exhibit A, Mr. Black. I believe you have heretofore testified with respect to some of the items that appear on that exhibit, having to do with the picking up of the horses on the Federal range within the area concerned, with which we are concerned in this case, is that correct?

A. Yes.

Q. Did you testify with respect to your activities on October 27, 1952, do you remember?

A. I don't remember whether I did.

Q. All right. I call your attention to that date, October 27, 1952. Did you, as Range Aid for the Federal Bureau of Land Managment, the United States Government, pick up any horses on this Federal range at that time?

A. Yes.

Q. How many horses did you pick up, Mr. Black?

A. I beg your pardon?

Q. How many?

A. Two.

Q. Do you remember where they were picked up?

A. Yes.

Q. Where?

A. At Alkali Point. That is on the Federal range.

Q. And what did you do with those horses?

[fol. 291] A. We took them up the road where there is a sheep corral there, and loaded them in the pick-up to Monticello.

Q. Could you lead those horses, were those horses broke to lead?

A. One was broke to lead.

Q. What about the other?

A. The other one, we had to pick it up and force it on the truck. We didn't pick it up off the ground, but we had to push it in by force.

Q. Were these two horses branded?

A. One of them was.

Q. Was the other one?

A. I can't recall for sure.

Q. Did you check to see if the brands were recorded at that time?

A. Yes.

Q. Were they recorded?
A. No.
Q. What was finally done with these two horses?
A. They were put into the Kuhni Packing Plant.
Q. I think that is spelled K-u-h-n-i. Where is this Kuhni Packing Plant?
A. It is between Springville and Provo.
Q. How much did you receive for those?
A. Three cents a pound.
Q. Did you haul those there?
A. Yes.
Q. I call your attention to October 31st, Mr. Black, in 1952. Did you pick up any horses on that date from this Federal range?
A. Yes.
Q. Who accompanied you at that time?
A. Robert Krumm.
Q. Is he an employee of the Federal Land Management?
A. Yes.
Q. Or the Bureau of Land Management?
A. Yes, sir.
Q. And how many horses did you pick up at that time?
A. 15 horses and 1 burro.
Q. Where did you pick them up?
A. On the McCracken Mesa.
Q. Were there any Indians around these horses when you picked them up?
A. No.

The Court: Didn't you cover those?
Mr. Thomas: No, I got down to this point.
The Court: Oh, all right.

By Mr. Thomas:

Q. Were there any Indians around these horses at that time?
A. No.
[fol. 292] Q. Where did you take these horses?
A. To Blanding.
Q. And they were on the Federal range, were they?
A. Yes.

Q. Did you check to determine whether those horses were branded?

A. Yes.

Q. And were they branded?

A. Yes.

Q. All of them?

A. Unless it was the burro. I don't recall the burro being branded.

Q. Did you determine whether those brands were recorded?

A. Yes.

Q. Were they recorded?

A. No.

Q. Do you know to whom these horses belonged?

A. No.

Q. What was done with these horses?

A. They were shipped to the same place.

Q. The Kuhni Packing place?

A. Yes.

Q. And sold for the price of 3 cents a pound?

A. Yes.

Q. Delivered. I call your attention to November 7, 1952, Mr. Black. Did you pick up any horses from this area on the Federal range?

A. Yes.

Q. On that day?

A. Yes.

Q. How many?

A. Four.

Q. And do you recall where they were picked up?

A. Yes.

Q. Where?

A. They were just north of the San Juan River, down under the rim of McCracken Mesa.

Q. Were there any Indians in the vicinity at the time?

A. No.

Q. Did you know, or do you now know to whom those horses belonged?

A. No.

Q. Were they branded?

A. Yes.

Q. Were the brands recorded?

A. No.

Q. What, if anything, was done with these horses?

A. They were took to the Cortez sale barn and sold at auction.

Q. They were sold at auction?

A. Yes.

Q. And how much did you receive for them, do you have a record of that, Mr. Black?

A. Yes, we received 1-1/5th cents a pound.

Q. And what was the total amount, do you recall?

A. $31.73, after the commission and the other was taken out.

Q. For the lot of them?

A. Yes.

[fol. 293] The Court: Who bought them?

By Mr. Thomas:

Q. Do you remember who bought them?

A. Yes, the manager of the sale barn, Bill Leeksliter.

Q. Were those horses broken or unbroken?

A. They were unbroken.

Q. I direct your attention to December 17, 1952, Mr. Black. Did you pick up any horses or burros on that day from this open range, this Federal range?

A. Yes.

Q. Where did you get them, do you recall?

A. Yes, they were in a canyon called Squaw Canyon up in the North Fork, running off from Cross Canyon, and Cross Canyon runs into Montezuma.

Q. Were there any Indians near these horses at the time?

A. No.

Q. And did you at the time know to whom these horses belonged?

A. No.

Q. Were they branded?

A. Yes, some of them.

Q. Were those brands recorded?

A. No.

Q. What, if anything, did you do with those horses after you picked them up?

A. We sold them to the Kuhni Packing Company.
Q. At the same price?
A. Yes.
Q. That you received for the other horses?
A. Yes.
Q. Were those horses broken or unbroken?
A. They were unbroken.
Q. What about the burro?
A. The burro was an old poor burro that we couldn't hardly get to travel, and his hair was so long we couldn't tell whether he was branded or not. In corraling these horses one of those was killed. He broke his leg when we were trying to corral them. They broke away from us and crowded out on a ledge, and this one horse was crowded out on a ledge and broke his leg off, and that was one of the horses marked down as killed.
Q. But you sold the balance to the Kuhni Packing Plant, did you?
A. Yes.
Q. I call your attention to December 22, 1952, Mr. Black. Did you gather any horses on this Federal range on that day?
A. Yes.
Q. How many?
A. Two.
[fol. 294] Q. Do you recall from where you gathered those two horses?
A. Yes, they were at Montezuma Creek.
Q. Were there any Indians near these horses, or any Indian dealings?
A. No.
Q. At the time, did you know to whom these horses belonged?
A. No.
Q. Were they branded?
A. I don't remember. I think one of them had some kind of a brand on, but we couldn't read it, and the other one was unbranded, if I recall right.
Q. And what, if anything, was done with these horses?
A. They were shipped to the Kuhni Packing Plant.
Q. At the same price you received for the others?
A. Yes.

Q. Now, I direct you attention to December 23, 1952, Mr. Black. Did you gather any horses from this Federal range on that day?

A. Yes.

Q. How many?

A. Eight.

Q. Do you recall from where you gathered these horses?

A. They were up Cross Canyon.

Q. Were there any Indians near these horses at the time?

A. No.

Q. Did you know at the time to whom they belonged?

A. No.

Q. Were they branded?

A. No.

Q. Do you remember they were not branded?

A. Yes, some of them were.

Q. Some of them were branded? Did you check the brands to determine whether the brands were recorded?

A. Yes.

Q. And were they recorded?

A. No.

Q. State whether or not those horses were broken or unbroken, do you remember?

A. They were unbroken.

Q. They were unbroken?

A. Yes.

Q. And what happened to those horses, do you remember?

A. They went to the Kuhni Packing Plant.

Q. At the same price that you sold the others for?

A. Yes.

Q. I call your attention to December 24, 1952, Mr. Black. Did you gather any horses on that day from this Federal range?

A. Yes.

Q. And how many did you gather?

A. Two.

[fol. 295] Q. Do you recall from where you gathered those horses?

A. Yes. They were a little north and east of Perkins ranch in Montezuma.

Q. Were there any Indians near these horses at the time?

A. No.

Q. Did you know at the time to whom they belonged?

A. No.

Q. Were they branded, can you remember?

A. One was branded and one was not.

Q. Was the brand recorded?

A. No.

Q. And what, if anything, was done with those horses?

A. One of the horses, the one without a brand was sold to the man in Montezuma, and the other one was shipped to the Kuhni Packing Plant.

Q. Do you remember whether those horses were broke or unbroke?

A. The one horse was broke, and the other was unbroke.

Q. Now I direct your attention to December 29, 1952, Mr. Black. Did you gather any horses on that day, December 29th?

A. I don't recall that day. I don't remember.

Q. You don't recall those that day?

A. No.

Q. I direct your attention to December 30, 1952. Did you gather any horses on that day?

A. Yes.

Q. How many?

A. 2 horses and 22 burros.

Q. And from where did you gather these horses and burros?

A. In Montezuma Creek.

Q. Were there any Indians near these horses and burros at the time?

A. No.

Q. Did you know to whom they belonged?

A. No.

Q. Were they branded?

A. One of the horses was.

Q. Was the brand recorded?

A. No.

Q. And what, if anything, did you do with these horses and burros, Mr. Black?

A. They were shipped to the Kuhni Packing Plant.

Q. From where, Blanding?

A. From Blanding.

Q. And did anybody come and claim these horses and burros?

A. No.

Q. Before you shipped them?

A. No.

Q. They did not? And you received the same price for them?

A. No, we received 2¾. These were so small the pack-[fol. 296] ing plant wouldn't give the regular price they had told us before for them.

Q. I direct your attention to December 31, 1952, Mr. Black. Did you gather any horses on that day from this Federal range?

A. Yes.

Q. How many?

A. Well, we gathered 8 head, but we took them—this was on Cahoon Mesa, and we took them to the corral and corralled them, and after we got them in the corral and was in there tallying them and getting the brands, a Navajo boy rode up to the corral and after we got the horses tallied I went out and asked him what he wanted, and he said one of the horses in the corral belonged to him, and I asked him which one, and he picked out a sorrel, bald-faced horse that was in the corral. So I went over to my horse and got my noose, and got that horse and turned it out and gave it to the boy. And I asked him if he knew any of the other horses in the corral, and he said no. And we loaded them in the truck and took them to Monticello.

Q. Did you ask him about knowing anything to whom the horses belonged?

A. Yes.

Q. What did he say?

A. He said he didn't know.

Q. Did you know that Navajo boy?

A. No, I don't.

Q. You are not acquainted with him?

A. I asked him his name, but he wouldn't tell me.

Q. Do you see him in the courtroom?

A. No. I might state that he told who the horse belonged to, and he is in the courtroom.

Q. Well, the horse did not belong to the Navajo boy?

A. No. He claimed it belonged to his family.

Q. To whom did he say it belonged?

A. Cy Begay.

Q. Cy Begay?

A. Yes.

Q. Is that Cyrus Begay?

A. Yes.

Q. Did Cyrus Begay ever talk to you about any of these horses or make any claim for them?

A. No.

Q. Now, did you notice any brands, or see any brands on these horses?

A. Yes, some of them were branded.

Q. And were any of the brands recorded?

A. No.

Q. Did you know to whom they belonged, Mr. Black?

A. No.

[fol. 297] Q. And what happened to these horses?

A. They were shipped to Kuhni Packing Plant.

Q. At the same price?

A. Yes, three cents a pound.

Q. Now, Mr. Black, I direct your attention to February 20, 1953. Did you gather any horses on that day?

A. Yes.

Q. Where did you gather them, if you remember?

A. This was on Cahoon Mesa.

Q. Were there any Indians near them?

A. No.

Q. How many horses did you gather?

A. 14 head.

Q. Were these horses broke or unbroke?

A. I think there was one mare in the bunch that was broke.

Q. And what about the other 13?

A. The others were unbroke.

Q. The other 13 were unbroke?

A. Yes, mares and colts.

Q. And what happened to these horses, Mr. Black, do you remember?

A. There was 9 of them was shipped to Kulini Packing Plant, and 5 of them was killed.

Q. Now tell the Court what happened, how they were killed.

A. Well, when we got to Monticello 4 of them was down, or these 5 horses were down. One of them had his foot through the rigging, and we couldn't possibly get him out, and he was just about dead, anyhow, so we had to shoot him and shoot his foot off to get him out of the trucks. There was two already dead that had been trampled in hauling them in, and another one so near dead they killed him, and later another got sick and was unable to eat or drink, and we hauled it out and shot it about two days later.

Q. Were these horses broke or unbroke?

A. They were unbroke.

Q. Unbroken?

A. Yes.

Q. And did you know to whom they belonged, Mr. Black?

A. No, I didn't.

Q. Did you see any brands on them?

A. Yes, some of them were branded.

Q. Did you check the brands to see if they were recorded?

A. Yes.

Q. And were they recorded?

A. No.

Q. Now Mr. Black, I direct your attention to a time in July, 1952. Were you present when any Indian women were handcuffed together?

A. Yes.

[fol. 298] Q. Would you tell the Court whether or not you had anything to do, or what you did in connection with this handcuffing of these women?

A. I had nothing to do with it. I was in my truck and never did get out of it all through the performance.

Q. Did you pick up any of the sheep that were picked up at that time?

A. No.

Q. Who did?

A. The sheriff and the man he had with him.

Q. Why did you go to this place at all, Mr. Black, on that occasion?

A. The sheriff asked me to go with him to identify the

land, the ownership of the land, and I knew the Indians involved, and he wanted someone along that knew the Indians.

Q. Did you see any Indians handcuffed at that time.

A. Yes.

Q. Do you recall the names of those Indians?

A. No they would not tell their names.

Q. Would you recognize them in the courtroom, Mr. Black, do you think?

A. Yes.

Q. Who are they?

The Court: There isn't any dispute about it.

The Witness: The girl over there.

By Mr. Thomas:

Q. Mr. Black, how many women were handcuffed together?

A. 4.

Q. Who handcuffed them together?

A. The sheriff.

Q. Did you put your hand on—did you have anything to do with the handcuffing of those women?

A. I was not near them at all. I was about 100 yards off in my truck, and I never did get out of my truck.

Q. Did you take part, in any way, Mr. Black, in gathering up those sheep?

A. No.

Q. On what land were those sheep gathered?

A. On Federal range.

Q. On Federal range?

A. Yes.

Q. Was that within the area, this disputed area?

A. Yes, it was the Montezuma area.

Q. And was that Federal range under permit?

A. Yes.

Q. To whom was that permit issued, do you know?

A. Delbert Redd.

[fol. 299] Q. Now, I call your attention to a time in July, 1952, just prior to this time. Did you go to this vicinity when any other sheep were picked up?

A. Well, I was in the vicinity that morning. The sheriff

went down there that morning and asked me to go down and show him the lines on a certain school section down there, and I went down and showed him a survey corner there that morning. There was a bunch of sheep up on the sidehill there, and he said, "Evidently them sheep are on t' school section then, aren't they?" And I said, "You can see for yourself. There is the pegs!" And I showed him and two other men he had with him.

This was the deputy sheriff, started up toward the sheep, and the Navajo man came out, and the sheriff and his men went up and started to drive the sheep, and this Navajo went up to prevent them from driving the sheep, and it looked like there was going to be trouble, so I went and left, and went over to my truck and got in the truck and went along, and later the sheriff and the two men that were with him came back and told me that the Navajo took the sheep away from them, and they couldn't get them, so they went to town, the deputy sheriff did, and called the sheriff and told him what had happened, and the sheriff got some more men and went down and picked these sheep up, and they had gone off of the school section on Federal range, and that is when they got them back. And the squaws came over and tried to prevent them from loading them, and that is when they handcuffed them.

Q. That was the same sheep then that you had to do with there?

A. Yes, the same bunch.

Q. I direct your attention to a different occasion, a different occasion entirely, Mr. Black. I believe it was in the month of July, 1952. Were you present when Leland Redd and some other men took sheep?

A. Yes.

Q. That were being herded by an Indian lady?

A. Yes.

Q. Do you remember where the sheep were at that time?

A. Yes.

Q. And on whose land were those sheep at that time?

A. They were on Delbert Redd's.

Q. Was it Delbert Redd's land?

A. Yes, it was deeded land.

[fol. 300] Q. It was deeded land? And did you have anything to do with the picking up of those sheep?

A. No.

Q. What did you do, what did you go there for?

A. They wanted to know where this private land was, and which was private land and which was Federal range, and they asked me to go with them to show them the lines of the land.

Q. Was that the Sheriff that said that?

A. Yes. And I went down with him, and we were going around and trying to follow out the lines of the private land, and he saw the sheep on the private land and said he was going to take them in. And I wasn't riding a horse at the time, and I thought I would keep kind of out of the way of the horses, and I sat there and watched them, and they asked me if they could load sheep into my truck and take them to town, and I told them no, I couldn't take any part in it at all.

Q. Did you take any part in it?

A. No. They put a wire corral around the sheep and loaded the first batch in the pick-up. Then Leland Redd took the pick-up and drove to town, and the Sheriff took the sheep and drove them up on a corral that was up on the Federal range, and I followed along up there later and went on to the corral where they were loading them, and Leland Redd came back with three other trucks to load these sheep, and there was some squaws came up there when we were loading them, and one I know very well, and she talked good English.

Q. What was her name?

A. Blanche Burke. She asked me where they were taking the sheep and where they were collecting them, and what they would have to do to get them back.

Q. What did you say?

A. The Sheriff was taking the sheep for being on private land, and there was a bill for feeding and loading them, and they would have to go in there and see the Sheriff and pay the damage bill on them to get them back, is the way I understood it.

Q. Mr. Black, are you acquainted with—did you ever request the Sheriff to go out there and remove those sheep?

A. No.

Q. Do you know at whose request he went?

A. I think he went at Leland Redd's request. Delbert

was sick and in the hospital at the time, and Leland was taking care of his sheep and land for him at the time.

[fol. 301] Mr. Thomas: I have so many notes here, if Your Honor please, I hope the Court will indulge me for just a moment.

By Mr. Thomas:

Q. Are you acquainted with Ben Fox's daughter?

A. Yes.

Q. Do you see her in the courtroom?

A. Yes.

Q. Did you have any conversation with Ben Fox's daughter respecting the use by her of any patented land owned by her north of the San Juan River, Mr. Black, do you remember?

A. No.

Q. Did you have any conversation with her last summer particularly, do you recall?

A. Most of my conversation she was present, but it was with her daughter. Now this lady told me she didn't own any sheep or any land, she was receiving an old age pension, and couldn't own sheep or land, because they were required, if they had anything to assist theirself, they couldn't draw this old age pension. She told me.

Q. Did she tell you she didn't own any land?

A. Yes.

Q. What was the conversation that you had in her presence with her daughter, do you remember?

A. Well, they were camping north of the road, between Butler and Comb Wash.

Q. Was that on Federal range?

A. Yes. And I told them that the restraining order that the court, Judge Larson had issued, said that any sheep that was left in that country was—if they were there in thirty days, they were going to get thirty days in jail and fined $250.00, and the sheep taken away and sold. I merely explained what the Judge said in court to her, and I had a Navajo with me who interpreted for me and told her the straight of what the Judge decided.

Q. And who was this Navajo boy, do you remember?

A. Eddie Gray.

Q. Is he is the courtroom?

A. No.

Q. He was a Navajo boy?

A. Yes.

Q. State whether or not you ever told her she must go off the patented land, or the land which she owned.

A. I have never seen her on her patented land.

Q. Just answer the question, Mr. Black, will you?

A. No.

[fol. 302] Q. Did you ever tell her she would have to go south of the San Juan River and take her stock with her or she would be put in jail?

A. I told her what the Judge had said, what the Court restraining order was. I tried to make it plain. It did not make any difference to me whether she went or not. I tried to tell her what the Judge said in his restraining order.

Q. Is that the only conversation you had with her or in her presence respecting this matter, Mr. Black?

A. No.

Q. What other conversation did you have?

A. Well, a few days before that we had practically the same conversation, only she was in a different location, and she brought out a piece of paper that showed that she had this land down on the San Juan River between Butler and Comb, and I explained what the restraining order said, and a day or two later when I saw her up there there was only seven days left in which the Judge gave them to move off, and she said she thought they just meant the new ones that had come over and did not mean the ones that had been over there for a year or two, and did not think it meant her. And I told her her name was in that list the Judge issued this restraining order on.

Q. In this first conversation did you tell her she must get off that land she showed you she owned by that paper?

A. No.

Q. Now, Mr. Black, I direct your attention, or hand you here what is marked Defendant's Exhibit B in this case. Do you recognize that exhibit?

A. Yes.

Q. Did you post that notice? That is a notice, is it not?

A. Yes.

Q. Did you post that notice, Mr. Black?

A. Yes.

Q. When did you post that notice?

A. On the 18th of July, and also on the 19th of July, 1952.

Q. Where did you post that notice on the 18th of July, 1952?

A. One in the County Courthouse on the billboard, just inside the front door, and one in the post office in Monticello on the billboard.

Q. And where did you post it on July 19, 1952?

A. And also one in the barber shop on the 18th.

Q. On the 18th?

A. In Monticello.

Q. All right. Where did you post it on July 19th? [fol. 303] A. On the 19th I posted one on an old fence at Montezuma Creek, just below the mouth of Cross Canyon.

Q. How did you post it there, by tacking it up?

A. With a tack, with a tack on the post.

Q. Where did you post the other.

A. The other one, in the Bluff post office.

Q. Are those two places more than two miles apart?

A. Yes.

Q. Are both of those places more than two miles from Monticello?

A. Yes, and I posted another one at Mexican Hat. That is where the bridge crosses the San Juan River.

Q. So you posted three outside Monticello?

A. Yes.

Q. That was on July 19th?

A. And another one in Blanding post office. That is four outside of Monticello.

Q. Four outside of Monticello? Why didn't you post those notices before July 18th or 19th, Mr. Black?

A. I was busy and just couldn't get around to it and did then.

Q. And when did you start picking up—did you have any conversation with Dale Kinnaman about posting these?

A. Yes, he directed me to post them and where to post them.

Q. And did he direct you to post them on that particular day, do you remember?

A. Well, no. It was before that he told me to post them just as soon as I could get at it.

Q. Now, Mr. Black, I direct your attention to October 31, 1952. Do you remember particularly picking up those 16 horses at that time?

A. Yes.

Q. Now, do you know where Sakezzie's rock house is?

A. Yes.

Q. Were these horses anywhere near Sakezzie's home?

A. They were about about two miles from there.

Q. About two miles? State whether or not you saw any of those horses in Sakezzie's corral. Do you remember?

A. I see some horses in his corral. I don't know that those were the ones.

Q. I see. Do you remember after you brought those horses to—where did you take those horses?

A. To Blanding.

Q. Do you remember what happened the next morning at Blanding?

A. Yes.

[fol. 304] Q. What happened?

A. Well, I went and arranged for trucks to haul them to Monticello, and one truck had a flat tire as we were going up there, and he stopped to get his truck fixed, and we went up and loaded.

Q. Who is "we"?

A. Jesse Johnson was the truck driver I engaged to haul the horses to Monticello, and his boy Duane was driving the other truck, and Duane and I went up to the corral to load the one truckload of horses, and Jesse took the other truck to get the tire fixed, and as we were loading, people kept climbing up on the corral to look at us loading the horses, and some Indians drove in in a pick-up. When we got the one truckload of horses loaded, we were waiting for the other truck, and I went over and said hello to the Indians and passed the time of day with them, and they said, "Where did you get the horses?" And I told them. They said, "You had two pick-ups to bring in these horses where you got them?" I said, "No, we had one pick-up." He said, "You had two pick-ups, because I saw the tracks of two pick-ups." And I said, "We had one pick-up, and we never did leave the road with the pick-up." And he said, "What

time did you get to town with those horses?" And I told him. And while we were in conversation some deer hunters drove up in an automobile to see the horses, and one of them had a new gun, and one of the fellows walked over and asked him about the gun, and they pulled their guns out and were firing through them, and looking at this new gun over there, and all of them followed the guns.

Q. By "one of the fellows," what fellow do you mean?

A. There was a county roadman there, Loren Hawkins, was the one that walked over and asked to see the new gun. He had heard of it.

Q. Were any of these guns pointed at any of the Indians?

A. No.

Q. Was there any conversation about shooting the Indians or threatening them with guns?

A. Not that I heard.

Q. Would you recognize the boys in the courtroom that came up there at that time?

A. Two of them.

Q. What are their names, if you know?

A. Tom Jones and Sam Chee.

[fol. 305] Q. Have you known these boys for some time?

A. I have known Tom quite awhile, yes.

Q. And how about Sam Chee?

A. I have seen him around a time or two, but I have never talked to him much to know him very well.

Q. Did these boys tell you to whom these horses belonged?

A. No.

Q. Did you examine the brands on those horses?

A. Yes.

Q. Were those brands recorded?

A. No.

Q. Did anybody ever make any demand to you, or to your knowledge to Mr. Kinnaman for these horses?

A. Well, Mr. Forest came up and——

Q. Wait.

A. Mr. Forest came up and said——

Q. Who is Mr. Forest?

A. He is superintendent or marshal there put through for the Indian Service.

Q. He is with the United States Indian Service?

A. Yes.

Q. When did he come up?

A. I seen him. I would just have to guess, but I think it was about November 6th.

Q. That would be about five days after this occurred, is that correct?

A. Yes.

Q. And where did you see him?

A. I seen him down at Montezuma, or pretty near Montezuma, going off from Mustang Mesa.

Q. Was he out on the range?

A. Yes.

Q. And did you have any conversation with him about these horses?

A. Yes.

Q. What was that conversation?

A. He said he had been to a meeting down to Ira Hatch's with officials from Window Rock and with Mr. Patterson, the Indians' lawyer, and Sakezzie had lost his horses, and he wanted to know if I got them, and I told him I got some horses out on McCracken, and he said, "What happened to them?" And I said, "They are up there in the barn, to Monticello." And he said, "Have these horses got a recorded brand on them?" And I told him, "No." And he said, "By what authority did you pick these horses up?" And I showed him the law and the brand book, and I and Mr. Forest both went through the brand book to see if these brands were recorded. And he said, "There is nothing we can do about it", and left. He said he was appointed by the [fol. 306] group there that had attended this meeting to find out where the horses were and what happened to them.

Q. And is that all the conversation you had with him respecting these horses?

A. Yes. We went through the brand books and everything, and he said that he thought that the district brands through the Indian Service were registered, and I looked that up, and it was not registered.

Q. Now, Mr. Black, do you recall Ira Hatch talking with you about the procuring of any horses, after any of these horses, after you had picked them up?

A. Yes.

Q. Can you fix the time of that to the best of your recollection? Do you remember which horses they were?

A. It was around about September 26, 1952, near that date, when Mr. Hatch came up and talked to me.

Q. And where did he talk to you, where was it?

A. At my home in Blanding.

Q. Concerning whose horses, whose alleged horses?

A. Little Wagon.

Q. Was Little Wagon with him?

A. Yes.

Q. Are you acquainted with Little Wagon?

A. Yes.

Q. Do you see him in the courtroom?

The Court: Over by the door.

A. Oh, he has his head turned there.

By Mr. Thomas:

Q. He has got his hand up by his ear?

A. Yes.

Q. That is Little Wagon?

A. Yes.

Q. Have you known him for many years, Mr. Black?

A. I have known him since about '47, yes. I met him down to Ira Hatch's store in 1947.

Q. Now what took place at your home at that time?

A. Ira said that Little Wagon claimed I had taken some of his horses, and he wanted to know what he could do to get them back. I told him he would have to see Dale, that I had no authority to let him have them back. And he wanted to know approximately what that would cost, and I said the only thing I can do is call Dale on the phone and ask him.

Mr. Oman: Who is this Dale?

The Witness: Dale Kimaman. And I went in my house and phoned Dale, and he said, "Before this time we have [fol. 307] been getting, we have been charging about $2.00 a month to trespass, on trespass horses." And he said, "We can probably prove that some of these horses have been out there for two years." And that is the report I made to Mr. Hatch.

Q. Well, what did you say to him?

A. I said that Dale has reported that he wanted two dollars a month, and probably those horses have been out there for two years. And Mr. Hatch says, "That is more than they are worth." He says, "Little Wagon hasn't got that much money, and I am not going to finance him further, for a horse is not worth it."

Q. Did you tell him how much was involved there?

A. No.

Q. How many horses did that involve, Mr. Black?

A. I don't know.

Q. You don't remember?

The Court: We will recess for a few minutes at this time.

(Thereupon a recess was taken after which the following proceedings were had.

The Court: Now there is one matter I think we overlooked. That is that I want to know, Mr. Oman and Mr. Thomas, which of these Indians have any allotments on that reservation. Now, we had one yesterday who was asked that question. Now, I would like to have you put Sakezzie back on. We may interrupt you a minute while it is on my mind, and I will know which of this little group of seven or eight people there in Montezuma have any allotments on the reservation, if any of them have.

Mr. Oman: May I confer with them a moment?

The Court: Yes, you and the interpreter and Sakezzie go out in the hall. I would like you to put him on.

(Thereupon a conference was had out of the courtroom between Mr. Oman, Mr. Sakezzie and the interpreter, after which the following proceedings were had:)

The Court: All right, go ahead, Mr. Oman, on that matter.

[fol. 308] Mr. Oman: If the Court please, Sakezzie does know pretty well about that matter, and I have here a full-blooded Navajo who is a member of the Council, whose specific work it is to know about those things.

The Court: All right, put them both on.

HOSTEEN SAKEZZIE, recalled as a witness by the plaintiffs, having been previously duly sworn, resumed the stand and testified through an interpreter further as follows:

Direct examination.

By Mr. Oman:

Q. Sakezzie, you know where the line is between the reservation and the disputed area?

A. Yes, just heard about it. I don't know where the line is.

Q. Do you know where the fence is that runs in front of the trading post and runs east toward Colorado?

A. I know that fence.

Q. That fence is approximately the line between the disputed area and the reservation, with the reservation south and the disputed area north.

(The interpreter translated the question thus far into the Indian language.)

Q. (Continuing) Now, Sakezzie, do you know what rights, of any kind, the plaintiffs in this action have to graze inside the reservation, and whether they have allotments?

Mr. Oman: If you will explain that to him, Mr. Interpreter, if you will go ahead and explain that to him.

Q. (Continuing) And tell us in your own words about the use they are permitted to make inside the reservation, and whether they have allotments there.

The Court: We have already been through that, their ancestral homes have been outside the reservation where they have been living. I want to know if they have got any home that has been allotted to them, of any kind, inside the reservation, and if they have any rights to graze sheep there.

The Witness: That we do not have. We do not have [fol. 309] any allotment or assignment in what is known to us at this point as the reservation.

The Court: All right, go ahead. Examine the witness.

Mr. Oman: Will the reporter read that answer?

The Court: He says no, they have no allotments or rights on the reservation.

By Mr. Oman:

Q. Do any of them graze inside the reservation, Sakezzie?

The Court: All I am interested in is whether they have any right to do so.

Mr. Oman: He said they had no allotments and no rights?

The Interpreter: No.

The Court: All right. Any other examination?

Mr. Thomas: I would like to explain to the Court, I have some documents here that have been taken from the records of the Indian Service. There is a letter dated August 29, 1930, however it is some years ago. I was wondering if that refreshes Sakezzie's memory?

The Court: No, he doesn't know anything about a document. You put that on in your case.

Mr. Thomas: I thought it might assist the Court.

The Court: Thank you, but my point is I don't think we can refresh anybody's recollection by documents he doesn't know anything about; in a foreign language to him.

Mr. Thomas: I thought the Interpreter might call his attention to them.

The Court: No, if there is anything there in the documents that might or might not be admissible, we will cover that later on.

Do I understand his testimony is none of these plaintiffs, and we are not talking about only Sakezzie, but we are talking about all these plaintiffs named in the complaint who are here suing, plaintiffs in this action, is it his testimony that what he says applies to all of them, none of them have any rights?

[fol. 310] The Witness: That is correct, not anyone of these complainants.

The Court: All right. Do either of you have any examination?

Cross-examination.

By Mr. Thomas:

Q. Did he have any rights in the year 1950?

A. No.

Mr. Thomas: No further questions.

The Court: Now I wonder if you gentlemen can stipu-

late that if each of these plaintiffs were called, sworn and examined individually, that they would testify substantially as Sakezzie now has testified?

Mr. Oman: Yes.

Mr. Thomas: I think so.

The Court: All right. Now, I would like to have you examine Bill Hatahley, because as I understand he is a member of the Navajo Indian Tribal Council.

Mr. Oman: That is right.

(Witness excused.)

BILL HATAHLEY, recalled as a witness by the plaintiffs, having been previously duly sworn, resumed the stand and testified through an interpreter as follows:

Direct examination.

By Mr. Oman:

Q. Bill, are you acquainted with what rights and what allotments, if any, the plaintiffs in this action have within the Navajo reservation for the use of lands?

A. No, they don't have any rights.

Mr. Oman: What does he mean by that?

The Interpreter: They haven't any rights.

By Mr. Oman:

Q. They haven't any rights?

A. No, they have no rights.

The Court: Now what is he talking about, all of these people who are plaintiffs in this action?

[fol. 311] The Witness: That is right, of all complainants.

The Court: They have no allotment there?

The Witness: No.

The Court: Now, he is a member of the Navajo Tribal Council there, and has he looked into that particularly, has he made a study of that in any way?

The Witness: That is true, that I am a representative from that area to the Tribal Council, but how did I seek or try to get a solution if I don't get in contact with these

people in the Bureau of Land Management department at this end, to contact me or make it a point to study this problem out?

The Court: No, I think you misunderstand. I don't believe you understand. What I want to know is have you ever looked into this question about whether they have allotments?

The Witness: Yes, I did, I looked into it but every place I went is already occupied.

The Court: That is to say, is it his testimony that all of the lands of the original reservation, and in addition all of the lands of the Aneth Extension are allotted, and there are no lands these people could move onto?

The Interpreter: That is correct, the land out there is already engaged in that area, but by the bona fide resident Indians that were already there when they put this extension in.

The Court: Yes. Now then, he said he represents the people in this area. Yesterday he said he didn't represent Sakezzie, Eddie Nacki, and these plaintiffs that don't have a representative on the Tribal Council. Is that right, or isn't it?

The Witness: That is to the human sense of the word, that our attitude as a Tribal Council member is that we should look after all of the Navajo people, wherever they reside.

The Court: I see. All right. Go ahead.

[fol. 312] Cross-examination.

By Mr. Thomas:

Q. Bill, didn't you have Census No. 18847 on the reservation in 1950?

A. That is correct.

Q. And didn't that authorize you to have some sheep on the reservation?

The Court: Well, that calls for a conclusion. Have you got a document that says that?

Mr. Thomas: Yes, there is a document.

The Court: Well, don't ask him conclusions of law, and don't ask him what a document contains.

By Mr. Thomas:

Q. Do you remember, Billy, whether you had Permit No. 12-35 for 54 sheep?

The Court: When?

Mr. Thomas: In 1950

A. That is correct.

By Mr. Thomas:

Q. And didn't Jim Hatahley have a permit for some sheep then too?

A. I think Jim Hatahley is here present too.

Mr. Thomas: He will answer for himself.

The Interpreter: What do you want about Jim Hatahley?

By Mr. Thomas:

Q. Do you know whether or not he had a permit at that time also for some sheep?

A. I do not know.

Q. Do you have that same permit now, Billy?

A. Yes.

Q. Do you know about the permits in 1950 that any other of the plaintiffs had?

A. I do not know whether they have the permit.

The Court: Is there anything further?

Mr. Thomas: No, that is all.

The Court: Well now, as I understand it, all Navajos, wherever they live, are represented on the Tribal Council. That is to say, the councilmen represent them all. The councilmen are elected for that purpose, is that right?

The Witness: That is correct.

[fol. 313] The Court: Regardless of whether they live on the reservation or not?

The Witness: That is correct.

The Court: Any other questions?

(No response.)

The Court: That is all. Step down.

(Witness excused.)

The Court: Now, put on your witness, Mr. Oman.

HOWARD W. GORMAN testified as follows:

Direct Examination

By Mr. Oman:

Q. Will you state your name for the reporter?

A. Howard W. Gorman.

Q. You have been previously sworn in this matter?

A. Yes, sir.

Q. Mr. Gorman, are you officially employed by the Tribal Council of the Navajo Tribe?

A. Yes, sir.

Q. In your work in that capacity, have you made a study of that part of the Navajo reservation which adjoins on the south the disputed area with which we are here concerned?

A. I have.

The Court: That is the Aneth Extension?

The Witness: Yes, sir.

The Court: And it generally is bounded on the north by the San Juan River in this vicinity, isn't it?

The Witness: The Aneth Extension lies north of the San Juan River.

The Court: Oh, it does?

The Witness: It does. It goes pretty near up to Hatch's Trading Post, and down the San Juan River, right along Montezuma Creek on the east side.

The Court: That is to say the Aneth Extension comes up through Montezuma Creek on the east side?

[fol. 314] The Witness: Yes.

The Court: So the east side of Montezuma Creek is in the reservation and the west side is not?

The Witness: Is not. McCracken Mesa is on the west side of Montezuma Creek, and that, to my knowledge, is where most of these plaintiffs have always lived.

The Court: On the west side of Montezuma Creek?

The Witness: On the west side of Montezuma Creek and north of the San Juan River.

The Court: All right, go ahead.

By Mr. Oman:

Q. Mr. Gorman, will you tell us what is the relationship of this group of plaintiffs to the Navajo Tribe, and how

they function with the Indian Service at its headquarters at Shiprock?

A. Traditionally they do not have any connection with either, either the Bureau of Land Management or the Indian Service.

Q. You mean the Tribal Council?

A. Tribal Council. Traditionally they are members of the Navajo Tribe. They are considered that way, but the Bureau of Land Management, instead of going to the plaintiffs, the Navajos in the Montezuma area, have gone mistakenly to Shiprock, the Indian Department. That is where the mistake has been.

Q. Now, do you mean to say that these plaintiffs are an independent clan or band of Indians who do not have representation in the tribe, and who have no official connection with the Indian Service?

A. That is what I mean, because these reservations are patterned after treaties, Treaty Navajos. They didn't go to Ft. Sumner, as far as I know.

The Court: Did they have any negotiations with the Government when the Aneth Extension was added to the reservation? Do you know anything about that?

The Witness: No, I don't know anything about that. It is too far back.

The Court: Well, that is not as far back as the Ft. Sumner. Ft. Sumner was 1868. That was when the reservation was originally set up. The Aneth Extension came along later than that. I don't know when that was.

[fol. 315] Mr. Thomas: 1932.

The Witness: I would rather not say anything at this time, your Honor, in connection with that, because I do know some hearsays.

The Court: That is no good.

The Witness: That is no good, so I would rather not say anything about it.

By Mr. Oman:

Q. You say that the Bureau of Land Management has gone to Shiprock and had dealings about these people with the Indian Service at Shiprock?

A. Yes, sir.

Q. But do these plaintiffs recognize what Shiprock does for them, or in their behalf?

A. No, they don't.

Q. Do you know where these permits about which Bill just testified in examination by Counsel for the Government are issued?

A. They are issued for the use rights within the Aneth Extension.

Q. By whom are those permits issued?

A. The Indian Service.

Q. And did I understand you to say that the Bureau of Land Management had gone to the Indian Service at Shiprock to have them issue these permits for these plaintiffs?

A. I don't know that part of it.

Q. What do you mean by the fact?

A. I mean the Aneth Extension is the Navajo reservation. It is part of the Navajo reservation, the treaty reservation. The permits that they now hold are issued for within the Aneth Extension only.

Q. I see. Now, do you know whether any of these plaintiffs have any allotments granted to them within any part of the reservation, Aneth Extension, or any other part?

A. They don't have any allotments in Aneth Extension, and Aneth Extension is held in common by the United States Government for all Navajos that live within that area, but they do have and did have allotments on the outside within the disputed area.

Q. Now, Mr. Gorman, you say none of them have any allotments?

A. That is right.

The Court: In the reservation?

The Witness: In the reservation.

[fol. 316] By Mr. Oman:

Q. Do you know what, if any, use rights they have within this Aneth Extension?

A. Yes, they have a land use right, provided that the Navajos that live within the Aneth Extension agree to them using part of their range, but there is no range.

Q. Unless the ones already there agreed to let them use a part of their range?

A. Yes.

Q. Is that the only——

A. Yes, that is the only use they can have. Outside of that they don't belong there. They are in trespass if they are.

Q. Is that use that any of these plaintiffs make limited to a part of the year, or is it total year-round use?

A. As far as this independent group of people from this area, the disputed area is concerned, we, the Navajo Tribe, know there is no agreement for them to use any part of the reservation. But there has been an agreement worked out, I think between the Bureau of Land Management and Indian Service, where they have come to agree for these people—that these people didn't agree to it—that they would let them use seven months out of the year within the disputed area, and then five months within the Aneth Extension, where they don't belong, and there is no room within Aneth Extension.

However, not all of the plaintiffs have that right. Only seven of them have a right to come up into this disputed area.

The Court: That is for the seven months out of the year?

The Witness: For the seven months out of the year.

The Court: Who are those seven? Can you tell me? If you can't, will you find out and tell me tomorrow morning? That would be better.

By Mr. Oman:

Q. Do we understand you then, Mr. Gorman, that none of these people have any rights to be in there, even these temporary rights, with the arrangements with the Navajos already in the Extension, any more than five months a year?

A. That is right.

Q. What do they do for the other seven months a year?

A. They belong in the disputed area. The Bureau of Land Management and the Indian Service made an agreement that the Bureau of Land Management will let the [fol. 317] Indians come into this disputed area for seven months a year.

Q. Seven of them?

A. But the rest of them are people without any land.

Mr. Oman: That is all, I believe.

Cross-examination.

By Mr. Thomas:

Q. Do you know whether or not those permits have been revoked by the Bureau of Land Management?

A. No, sir; I don't.

Q. Do you know whether or not the Indian Service has actually issued any permits to these people, Mr. Gorman?

A. Those that have been, those that have moved back after the M-F Extension has been set up, yes.

Q. They have issued permits to those people?

A. For the seasonal permit.

Q. I don't suppose you know anything particularly about Bill Hatahley?

A. No, I don't.

Q. Jim Hatahley?

A. No, I don't.

Q. Slim Todachennie?

A. No, I don't.

Q. Cyrus Begay?

A. No, sir.

Q. You don't now recall the names of those seven people that were given those?

A. No, sir.

Mr. Thomas: I believe that is all.

The Court: Any further cross-examination?

Mr. Thomas: Not right now.

The Court: Do you have any further cross-examination about what he has testified to up to this point?

Mr. Thomas: No.

(Witness excused.)

JACK H. PIPER testified as follows:

Direct examination.

By Mr. Oman:

Q. State your name.
A. Jack H. Piper.
Q. Where do you live, Mr. Piper?
A. 1590 East Forty-Eighth South, Holladay, Utah.
[fol. 318] Q. You are not connected in any way with this case?
A. I am not.
Q. What is your business?
A. I am a dealer in horses and also in the pipe-fitting business.
Q. For how long a time have you been a dealer in horses, Mr. Piper?
A. For about eighteen years.
Q. Are you currently in that business?
A. I am.
Q. And have continuously so been for these last eighteen years?
A. I have.
Q. In that business are you engaged in buying and selling horses?
A. I am.
Q. Are you likewise engaged in breaking and training and feeding horses?
A. Yes, sir.
Q. Are you likewise engaged in renting horses, and do you have frequent contact with horses that are rented?
A. Yes.
Q. Mr. Piper, will you tell us, if you know, what the rental value of a horse was per day within the State of Utah in 1952?

Mr. Thomas: I object as being immaterial and irrelevant, not within the issues of the case.

The Court: I think so, Mr. Oman.

Mr. Oman: I think, your Honor, there is a possibility of an element of damage here by the fact that these plaintiffs have been denied the use of their animals for a period of

time, and what that is worth. We yet have no testimony upon it.

The Court: Well, you said 1952.

Mr. Oman: That is right. That is when the horses were taken, and, I can come from there down.

The Court: Well, it would only be material for the period since the horses were taken. That is one thing about your question. Then another thing about it is you say, "within the State of Utah." I don't believe that places it close enough to the area in question here. Now, find out if this man knows anything about the southern part of the state, the southeastern part of the state. It does not need to be right there in Montezuma Creek.

[fol. 319] By Mr. Oman:

Q. The area with which we are concerned, Mr. Piper, is in southeastern Utah.

The Court: The southern part of Utah. Do you know anything about that?

The Witness: Yes, I have been down through the southern part of Utah, also Arizona, and also over in Texas, dealing in Texas.

The Court: We are talking about the country down in the southeastern part of the state, particularly around Blanding. Do you have any knowledge at all about the market, either for the sale of horses or for the rental of horses, in or around Blanding, or in that general part of the state?

The Witness: Well, I think I do on the sale of horses, but I have never rented any horses out in that part of the country.

The Court: You have had some experience in the sale of horses?

The Witness: Yes, I have sold some horses up through Price and Monticello.

The Court: Well, Monticello is in that area. Go ahead, Mr. Oman.

By Mr. Oman:

Q. In the sale of horses, Mr. Piper, how many horses did you handle, as nearly as you can tell, buying and selling, in the year 1952?

A. In this particular area, or just in general?

Q. How many were handled in your experience?

A. Now this fellow that he and I worked togethe , from Texas, and sold horses from the year 1950 to the spring of '53, that was this year, and I dare say we sold upwards of three hundred head of horses in that period of time.

Q. Have you sold any in Utah?

A. Yes.

Q. And you say you have sold some in the vicinity of Price and Monticello?

A. Yes.

Q. What kind of horses were these, saddle horses?

A. That is right, just good breed use horses. They weren't registered horses. Saddle horses, horses that were used with stock, and western type horses.

[fol. 320] Q. Then will you give us your opinion as to the value of such a horse in the year 1952?

The Court: Can't you fix that? When were these horses supposed to have been taken?

Mr. Oman: March and September.

The Court: It is the spring and summer of 1952?

Mr. Thomas: September, 1952, to March, 1953.

The Court: In that period.

By Mr. Oman:

Q. What is the price of a good use horse?

A. The price of good bred horses has been about the same for the last four or five years. The market value hasn't changed much, and the market value for just a good bred use horse, it isn't registered, but a horse with good blood in him, would be from $250.00 to $350.00.

Q. You don't mean a purebloood?

A. A western horse, infused by good blood, not thoroughbred, a quarter horse, Morgan quarterbreed, halfbreed etc.

Q. Mr. Piper, have you had experience in renting horses out for deerhunting expeditions in different parts of the state?

A. I have.

Q. Does the rental value of that horse differ in one part of the state from another part of the state?

A. To my experience and knowledge it would not. It would be about the same all over.

Q. Can you tell us what your opinion is as to the rental value of a horse per day?

Mr. Thomas: I object to it, if your Honor please, as not being within the issues of this case.

Mr. Oman: It may or may not be, your Honor, but it is an element.

The Court: Well, I will tell you what my view about it is, Mr. Oman and counsel. One element of damage here is the loss of the animal. Now, the measure of damage is the market value of the horse at the time it was wrongfully converted. Now, we have had some good testimony about that.

Now, there is another element of damage in this case covered under the subject of consequential damage. A man [fol. 321] who commits a wilful wrong is responsible in the law for all of the consequences which flow from that wrong, which are natural consequences. Now, you have got a lot of evidence in here about that. These people can't send their children to the schools. They can't go down and get their groceries. They can't haul their water in, in this very area or region. They can't move water from one camp to another camp. They can't herd their goats. They can't herd their sheep, because in this rugged, craggy country they can't get around on foot to take care of any considerable number of animals. Another element is that when they get hard put to it for food, they eat those horses.

Now, it seems to me to have been a very great waste of food to have hauled off 150 of these animals and sold them to a glue factory for a couple of cents a pound. I think that is atrocious.

Well now, you have got all of them. You see, there is quite a lot of consequential damage. Now, in addition to that you had suggested these people need those animals in emergencies to travel. There has been a good deal of testimony here about their anxiety living out in that wilderness, the remote part of the world, desolation, and having no means in an emergency of getting anywhere for help. Well now, all of those things are in the category of consequential damages.

Now, it seems to me that the measure of damage for that injury is somewhat like a measure of damages for pain and suffering in personal injury actions. That is to say

the law affords no very good precise measure of the money value of those things. It is left, in case of a personal injury action, to the good judgment and common sense of the jury. Now, in a claim against the United States under the Tort Claims Act, the Court sits as a jury and tries the facts. So it seems to me that the law of injury in a lot of respects is not different from the destruction of a horse. The thing the Court has got to do is to exercise good judgment and common sense about very much like pain and suffering in a personal injury action.

Now, that has been my thinking about it as I have sat [fol. 322] here for the last three or four days, and I am not at all convinced that the rental value of a horse is going to help me out at all.

As a matter of fact, I don't think the rental of the horse is a measure of it here, but I think maybe we ought to take that testimony, Mr. Thomas, and I take it with this thought, that if you want to move to strike it later when we clear up the thinking on the measure of damages you may do so. There is no jury here so nobody is being prejudiced by receiving it. Go ahead.

Mr. Oman: You may answer it.

A. On the experience I have had in renting horses, you rent them $1.00 an hour, or $5.00 for an eight-hour day.

By Mr. Oman:

Q. How about deer hunting trips where they take them over a week's time?

A. We charge them $5.00 a day.

The Court: Would that be true of the area in question, do you have any exact knowledge of that?

The Witness: No, I do not, but it is about the same all over.

The Court: In western country where there is recreation and you had that sort of business?

The Witness: Yes. Some large outfits down south that might accommodate these rich people from California, etc., they might charge more.

The Court: I have found that out. I don't mean I am one of the rich people from California, but I know what you mean.

By Mr. Oman:

Q. Mr. Piper, can you tell us where a horse is kept on a feed, hay, and that being his only feed, how much hay he will consume in a month?

A. Well, he will consume at least his weight per month.

Q. What consumption would the average saddle horse—how much would the average saddle horse eat?

A. A one thousand pound horse will eat at least one thousand pounds of hay a month.

Q. Did you buy hay in 1952 in the vicinity of the area [fol. 323] with which we are concerned?

A. Yes, I did, at Price and Monticello.

Q. What was that price?

A. $25.00 a ton was what I gave early in the fall and probably $35.00 in the middle of the winter.

Q. And have you bought hay since then in that area?

A. Yes, I have.

Q. What is the value of the hay?

A. It is just about the same.

Mr. Thomas: I object to this, if Your Honor please, it being immaterial and no testimony here at all.

The Court: Well, the point is, Mr. Thomas, that when they have to buy breeds of horses that aren't accustomed to foraging for themselves, they have to keep them alive, especially in the winter, and in drought seasons, so I think maybe this has some importance.

By Mr. Oman:

Q. What has been that price, Mr. Piper?

A. Yes, it is just about the same as it was in 1952.

Q. And is that about average price over the years, Mr. Piper, would you say?

A. Well now, in the year, the fall of 1948 and 1949 I went up as high as $80.00 a ton. That was the exception.

Q. It was a hard winter.

A. It did go that high.

Q. Jack, you say you have been a horseman all your life. Can you tell us about the nature of a horse to remain where he has been raised, and the nature of him to return to that area if he is taken away?

A. Well, my experience with horses is that a horse always goes back where he is born.

Q. Would he ever leave the place where he has been born and raised?

A. Very seldom will he leave the place where a horse is born and raised. He will always head back for that place. It might take him a year or so to do it, but he will always do it.

Mr. Oman: That is all.

Cross-examination.

By Mr. Thomas:

Q. Are you familiar with Indian horses?

A. What?

Q. Are you familiar with Indian horses?

A. Yes, I am.

[fol. 324] Q. Do you mean to say, Jack, that the average Indian horse would sell from $250.00 to $350.00 each?

A. I have sold one Indian, Jack Santayo, in the Uintah Basin, a horse for $1,000.00. He wasn't a registered horse.

Q. That is an exception?

A. He was a good horse. I will admit that.

Q. The average Indian's horse is inferior to the average white man's horse?

A. I wouldn't say that, no, sir.

Q. They are smaller. Suppose a horse weighs about five hundred to six hundred pounds. That is not considered a good saddle horse, is it, of that size, unless he is particularly well bred?

A. Well, just for example, if I may give an example——

Q. Can you answer that?

The Court: Let him answer in his own way.

A. Those little horses, sometimes 14-2, which is 48 inches, one just sold for $30,000.00. He is a small horse, but he just sold in California a year ago for $30,000.00. I don't think size has anything to do with it, as far as my opinion is concerned. It is what the horse can do, is where your value comes.

By Mr. Thomas:

Q. You say you are familiar with the Indian horses?
A. I am.
Q. Their average horse is very much inferior as to cost to the average white man's horse, is it not?

The Court: He has answered that question.

A. I would say not. Not for the Indian horses I have been in contact with.

By Mr. Thomas:

Q. Have you contacted any Indian horses in this area?
A. In this area?
Q. In the Monticello and Blanding areas.
A. No, I have not.
Q. You have not?
A. But I have contacted a lot of Indian horses in the Uintah Basin.

Mr. Oman: What about New Mexico?
The Witness: Yes, and in New Mexico.

By Mr. Thomas:

Q. Does that rental rate of $5.00 a day include the saddle?
A. Yes, it does.

[fol. 325] Mr. Thomas: That is all.

(Witness excused.)

The Court: Well, that is all. That is all we are going to do before we leave tonight, but something has been running through my mind. It hasn't got a whole lot to do with this lawsuit, but it has a great deal to do with these people.

Roark Bradford wrote a book some years ago, and the name of the book was "John Henry," and John Henry was a fellow who never lived. He was the equivalent down south of Paul Bunyon up north, in the north woods. John Henry was a powerful man physically, and the first paragraph of the book concerned the birth of John Henry. When John Henry was born, Roark Bradford says that

lightning flashed, thunder roared, and the Mississippi River ran one thousand miles upstream. John Henry weighed forty-four pounds. He was born down in Louisiana in Mississippi country, and a few minutes after he was born and was in his crib, he straightened up, looked around, and said, in the Negro dialects, "Have the dogs been fed?" His papa said, "Yes," and his mamma said, "Yes, long since." The nurse said, "Sure." And he said "Well, ain't I as good as the dogs?"

About a year ago there was a little dog on the highway down near Cedar City, deserted. Nobody knew where the owner was, and it scurried away into the brush, and any body that came near it, nobody could help him much. Some folks left a little food alongside of the road, and when the folks had gone the dog came out and got the food. Some of the local papers wrote a story about that, and that excited the interest and the sympathy of everyone in the state.

Well, aren't these people as good as dogs? I am distressed that there is any thought of discrimination against folks of this sort, and they ought to have been treated in that fashion.

We don't know what the legal rights are going to be in our Anglo-American jurisprudence, but really these folks don't understand anything about it all. But you and I, as human beings, are not any different than they are, and [fol. 326] the human problem, they are going to understand. All of us are the same.

It might not be such a bad thing for you folks to demonstrate our good will to these folks. Maybe charity begins at home. We have spent a lot of money all around the world. Well, we have got a problem down in the southwest. This is just one small little facet of that problem, this lawsuit, and we are not going to solve the problem by having a lawsuit brought now, and another one brought then, and another one at some other time called to the attention of the court, each little thing getting some kind of a solution.

We have got a big problem to solve down here, and we ought to be thoughtful about that, and, gentlemen, as far as the Court is concerned, we are going to approach this problem somewhat in that spirit if we can, and maybe after

a little while, if we keep after it energetically enough, maybe we will see some light on this subject.

The Court will be in recess until ten o'clock in the morning.

(Thereupon a recess was taken until 10 o'clock a.m. November 21, 1953.)

Morning Session, November 21, 1953, 10 o'clock, a. m.

The Court: Go ahead, gentlemen.

Mr. Thomas: I understood Mr. Gorman was coming. Will you call Dee Black, please?

DEE BLACK testified further as follows:

Direct examination.

By Mr. Thomas (continued):

Q. Mr. Black, yesterday I asked you about your activities on December 29, 1952, respecting the picking up of horses from this Federal range. Have you refreshed your memory with respect to that date?

A. Yes.

Q. Did you on that day pick up any horses from this Federal range?

A. Yes.

Q. How many?

A. Five.

[fol. 327] Q. And where were they picked up, Mr. Black?

A. In McCracken Canyon.

Q. Were there any Indians in the vicinity?

A. No.

Q. Did you know at the time to whom these horses belonged?

A. No.

Q. State whether or not any of these horses were broke or unbroke.

A. Two of them was broke.

Q. What about the other three?

A. They were unbroke.

Q. Were these horses branded?

A. Yes.

Q. Were the brands recorded?

A. No.

Q. In the State department? Now, what, if anything, was done with these horses, Mr. Black?

A. They were sold to Kuhni Packing Company.

Q. Kuhni Packing Company, at the same price that the other horses were sold which you testified to?

A. Yes.

Q. Did anyone come to claim these horses before they were sold, Mr. Black?

A. No.

Q. Now I believe this report, Exhibit No. A, indicates that some of these horses were sold locally. You mean sold at Blanding?

A. Blanding and Monticello, yes.

Q. Would you remember how many horses were so sold and what they were sold for, that is the price procured? To refresh your memory, Mr. Black, if you haven't the matter in mind——

A. There was fifteen sold locally.

Q. Would you just indicate when they were sold and how much they were sold for?

A. Well, they were sold at different times.

Q. When they were sold, how many at what time? Do you have the record?

A. Most of them were sold on the 1st of October, 1952, and one on the 13th of October, and some on the 14th, one on the 17th, and 2 on the 26th of October, 1952.

Q. All right. Then on a specific day when those horses were sold, how many were sold on the first day?

The Court: Well, he just told you.

By Mr. Thomas:

Q. What did you receive?

A. There was one horse sold for $30.00; one for $20.00; two horses was sold for $35.00.

Q. That is $35.00 for both of them?

A. Yes. Then the man that hauled the horses in, we hired his truck.

[fol. 328] Q. In from where?

A. In from the west of Blanding, about fifty miles.

Q. Fifty miles west of Blanding?

A. Yes.

Q. What is that area known as?

A. It is known as the Clay Hill.

Q. How many were brought in from there?

A. I don't recall the exact number, but it was two truckloads.

Q. All right, what about those horses?

A. This man said he would take two of these horses for his freight bill, which amounted to $58.80. Then there was another horse sold for $24.00; another one for $20.00; another for $5.00; another for $20.00; another for $20.00; and another for $20.00; and another for $20.00; and two more, $20.00 each.

Q. That totaled how much? Did you total it up?

The Court: Well, we can add that.

By Mr. Thomas:

Q. Mr. Black, how long have you lived in this area?

A. Since 1912.

Q. How old are you?

A. Forty-six.

Q. Are you acquainted with some or all of these Indians?

A. Some of them.

Q. Are you acquainted with Sakezzie?

A. I have known Sakezzie since 1947.

Q. Since 1947?

A. Yes.

Q. Now——

A. I knew him prior to that when I was working on the Forest Service. He came up on the Indian allotment, the Ute allotments up in Allen Canyon, and brought his sheep up on the Forest Service, and I was working for the Forest Service at the time.

Q. When was that?

A. It was in 1946.

Q. 1946?

A. Yes.

The Court: What was done?

The Witness: I went down and asked him to move his sheep off of the forest and showed him where the forest boundary was, and he moved his sheep down on the Indian allotments.

By Mr. Thomas:

Q. Now, at the time when you commenced the elimination of these abandoned horses, was there any other program [fol. 329] inaugurated at that time for the eliminating of abandoned horses on any other range?

A. Yes, we had the same program in effect in Grand County.

Q. What is the number of that range, that Utah grazing district, number what?

A. 9.

Q. Were any horses at that time taken, so-called abandoned horses taken from that range?

A. Yes, we shipped a lot from there just last week, 13 horses.

Q. Pardon me?

A. 13 horses.

Q. And what was received for those horses?

The Court: Well, that is not material.

By Mr. Thomas:

Q. Were they the same type of horses that were taken up in this program respecting Utah range, Utah Grazing District No. 6, I believe it is?

A. Well, they were a little bigger horses, a little better looking horses, and in better shape.

Q. Now, Mr. Black, are you acquainted with the M-F Extension on the Navajo reservation?

A. Yes.

Q. It is north of the San Juan River.

A. Yes.

Q. And state whether or not you know anything about a

program inaugurated by the Indian Service for an elimination of horses on the reservation?

A. Well, about a month ago——

The Court: Well now, if the Indian Service has taken any official action, this is not the way to prove it. Moreover, a month ago, we are not concerned with what is happening now. This is a year later. I think I know what you are coming at, but if there is any program down there of the Indian Service, this isn't the way to prove it.

Mr. Thomas: The matter I had in mind, if your Honor please, was the purpose of the program.

(Conference of Court and counsel out of the hearing of the reporter.)

By Mr. Thomas:

Q. Commencing during the year 1952, prior to the commencing of this program, Mr. Black, were you acquainted with this range area which is in dispute?

A. Yes.

Q. State whether or not you saw horses ranging on this area?

A. Yes.

Q. State whether or not there were many or few.

[fol. 330] A. Well, I estimated there were about four hundred head of horses on the range prior to this program in June and July.

Q. In June and July?

A. When we started the program.

Q. After the notices were published and posted, did you examine this range?

A. Yes.

Q. And were there the same number of horses in your estimation at that time?

A. No.

Q. Do you know what happened to those horses?

A. No.

Q. Mr. Black, did you make an investigation at any time respecting the holding of any rights of these Indians on the Indian reservation?

A. Yes.

Q. Did you ascertain whether or not Hosteen Sakezzie had any rights at all?

The Court: That is no way to prove that, no way to prove that.

Mr. Thomas: I will withdraw that.

The Court: If you claim there is any record anywhere of a grant to any of these people of any rights, why let's have it. But if you haven't got the custodian of the record here, you haven't got the record—maybe you have. You are not offering it at any rate. Asking this fellow who is a range rider and cowpuncher down there, and went out and rounded up these horses and hauled them off, you are asking him if he made any investigation of that. There isn't any materiality in this lawsuit, what investigation he made.

Mr. Thomas: No, it hasn't. I thought the Court wanted us to go into that and find out what his findings were.

The Court: It doesn't make any difference what his findings were. I want to know what the fact is, and this isn't the way to prove the fact.

Mr. Thomas: If your Honor please, we feel we can show by this witness that he examined the records in the Indian Service, and that the records showed at that time. I appreciate it is not the best evidence.

The Court: Well, it isn't. It isn't any evidence at all. [fol. 331] Mr. Thomas: No, that some of these Indians, including Hosteen Sakezzie——

The Court: That is this fellow's unlearned interpretation of some things that he saw down there. If you claim anything there, we ought to see it. Let me look at it. I will decide whether it transfers anything. That is a question for the Court to decide. It is really the ultimate question of law, whether he has any right down there, and I am not going to have this fellow go down to the Indian Service and decide that for me. I will do that for myself.

Mr. Thomas: With respect to this other matter the Court indicated he would like to go into——

The Court: What is that?

Mr. Thomas: That is with respect to their rights on the Indian reservation, and also in respect to their living and residing in this particular area.

The Court: We have gone into that pretty thoroughly, it seems to me. You just go ahead with your own case any way you want, but I am not going to let you put in evidence that is incompetent. This man could not under any circumstances tell us what was in those records.

By Mr. Thomas:

Q. Are you familiar with the range area, including the reservation and this open range, Mr. Black?

A. North of the San Juan River?

Q. North of the San Juan River, in San Juan County?

A. Yes.

Q. State whether or not there are many horses running on the open range, including, that is, the reservation.

Mr. Oman: I don't see what materiality it has, your Honor.

The Court: What do you claim for that?

Mr. Thomas: We claim for that, if your Honor please, that there were many horses there, the same type, which were available.

The Court: Well, he has already testified that there were four hundred horses there, and then at the time they went [fol. 332] to round-up there weren't four hundred horses, there was substantially less, and he has testified, not this morning, but previously, that since the round-up there are still a few horses around down there. Now, what more do you want?

Mr. Thomas: I mean particularly on the reservation.

The Court: On the reservation?

Mr. Thomas: Yes.

The Court: What importance is that? Of course there are folks who live on the reservation whose horses haven't been killed off by the vigorous efforts of the Bureau of Land Management.

Mr. Thomas: The only purpose would be to show the horses are available.

The Court: Well, my gracious sakes, the fact that you see horses running around on a reservation does not indicate at all that they are available to purchase or use by these people. I don't think that has any tendency to prove the fact. The objection will be sustained.

By Mr. Thomas:

Q. Mr. Black, state whether or not you had any difficulty in selling these horses?

The Court: Not a bit to a glue factory for two cents a pound, did you, Mr. Black?

Mr. Thomas: You may answer.

A. No.

By Mr. Thomas:

Q. You didn't have any difficulty in selling those horses to the Kuhni Brothers?

A. No.

Q. Did you have any difficulty in selling them for any more than that price?

A. Yes.

Q. Are you acquainted with the situation at Blanding with respect to the sale of horses?

A. Yes.

Q. During this period from September, 1952, to February, 1953, could you say whether or not there were any horses for sale at that time?

A. Yes.

Q. And were there?

A. Yes.

Q. Were those horses of the same type as you picked up, or better?

A. Better.

[fol. 333] Mr. Thomas: That is all. Oh, excuse me just a moment. That is all.

The Court: How long have you lived down in that territory?

The Witness: Since 1912.

The Court: Born down there?

The Court: Where were you born?

The Witness: I was born in Old Mexico.

The Court: Where did you come? In 1912, that was the first time you came into that area?

The Witness: Yes.

The Court: And where did you come to live at?

The Witness: Blanding.

The Court: Have you lived in Blanding or thereabouts since 1912?

The Witness: Yes.

The Court: Now all of that time have Sakezzie and Ed Nocki and these seven or eight families that live up there on Montezuma Creek lived about where they have today?

The Witness: I can't answer that: I know Antez and a few of them, but I don't know all of them, but I remember trading horses with Antez there in Blanding. He used to work there as a cowboy and used to live there for years, and I have known him ever since he delivered bales.

The Court: Some of them, at any rate, have lived in the Montezuma area?

The Witness: In the Montezuma area, and that would also include in the reservation at the time.

The Court: You mean where they are living is in the reservation?

The Witness: It is now, yes.

[fol. 334] The Court: I don't think you understand me. Your whole dispute arises, Mr. Thomas, doesn't it, because the area in dispute here is not in the reservation?

Mr. Thomas: Oh, yes the area in dispute is not in the reservation.

The Court: You don't claim—you think that is on the reservation?

The Witness: The Montezuma is, yes.

The Court: I am talking about the Montezuma Creek area where they live. You say they live on the reservation?

The Witness: Yes.

The Court: They do?

The Witness: Yes.

The Court: You had better examine him about that, for if they live on the reservation that is all the worse.

By Mr. Thomas:

Q. Do you know which ones live on the reservation?

A. Well, Sakezzie is the only one in here that does not live on the reservation at the present time. He lives about a mile or a half mile outside the reservation fence.

The Court: I see what you are talking about. You are talking about at the present time they have been driven back on the reservation by these present activities. Where did they live at the time the horses were rounded up, something over a year ago?

The Witness: Well, there was a few of them out on the Federal range prior to July, 1952, but since that time they have lived on the reservation.

The Court: What I am trying to get at, Mr. Black, hasn't Sakezzie lived where he is now living, where he was living a year ago when his horses were taken, hasn't he lived there ever since you came into the territory in 1912?

The Witness: I only remember him since 1947.

The Court: I see. I will ask you the same question about the others here you know anything about.

[fol. 335] The Witness: I only know of Ben Fox's daughter, has lived over in the Butler area since I can remember.

The Court: Any of the others?

The Witness: I don't know the others, since 1947.

By Mr. Thomas:

Q. Where is the Butler area?

A. It is west of Bluff.

Q. Is that on the open and Federal range?

A. Yes.

Mr. Thomas: That is all. May Mr. Black remain here? I don't anticipate we will put him on again.

Cross-examination.

By Mr. Oman:

Q. You say you don't know where Eddie Nocki has lived all these years, Mr. Black?

A. I know where he has lived since 1947.

Q. Where was that?

A. He has a home on the bank of the river, east of Bluff, up the river.

Q. That is in this disputed area, isn't it?

A. Yes.

Q. He has lived there all these years, hasn't he?

The Court: He says since 1947.

Q. He has lived to your knowledge, down to this last year, out in this disputed area, hasn't he?

A. Yes.

Q. Then do you want to change your testimony that none of the others have lived in this area?

A. They haven't since 1952. In July, 1952, they have all been on the reservation.

Q. When you picked up these burros you testified to picking up in Cross Canyon, there were Indian camps right before you while you were gathering those burros, weren't there?

A. No.

Q. You say there were no Indian camps there?

A. I didn't gather the burros at all. The other man was gathering burros, and I was gathering horses, and I seen no Indians in the area while I was driving the horses.

Q. You said you gathered these burros, and you said there were no Indians near that corn patch where those burros were gathered?

A. I was there helping gather the stock that was being gathered.

[fol. 336] Q. You know that was an Indian corn patch?

A. I know it was on Federal range.

Q. You know there was an Indian corn patch?

A. Yes.

Q. All those corn patches scattered about throughout that whole area are Indian corn patches, and you knew that, didn't you?

A. Yes.

Q. No white man has any land he cultivates there in any way?

A. A whole field was drilled there, and the Indians settled down and started to do a little farming, and that was the first it had happened.

Q. Right in the cornfields all around there were Indian camps?

A. I believe there was one at this time.

Q. Sure there was. And yet you told this court there were no Indians around.

A. I said I seen no Indians while I was moving these horses.

Q. You said day before yesterday that shortly after you gathered these horses Eddie appeared.

A. I did not.

Q. You didn't say Eddie Nocki appeared?

A. Yes, but I didn't say I gathered his horses.

Q. Did you ever gather his horses?

A. Not that I know of.

The Court: Well, he says he did not know whose horses they were.

By Mr. Oman:

Q. Are we to understand you never knew at any time who those horses belonged to?

A. I couldn't prove whose horses they were.

The Court: That isn't the question.

By Mr. Oman:

Q. You never knew at any time to whom these horses belonged?

A. No.

The Court: You had a pretty good notion?

The Witness: Yes.

The Court: Yes. Who did you think they belonged to?

The Witness: I thought they belonged to the Indians.

The Court: Sure.

The Witness: I gathered up white men's horses, and everybody's. I had a job to do, your Honor, and I was doing the best——

[fol. 337] The Court: You just answer the questions.

By Mr. Oman:

Q. You contacted Ira Hatch, didn't you, Mr. Black, along the road sometime in January, 1953? Do you remember that, driving along the road and meeting Ira coming out, as you were going into that area?

A. I think so, yes.

Q. You called attention to the fact that there were some Indian horses on Ira's privately owned land out in this disputed area?

A. Yes.

Q. And you told him you would get those horses too if he would give you permission to go on the private land, is that right?

A. Yes.

Q. You were taking these horses no matter where you found them, weren't you?

A. No.

Q. What about the horses and burros you took up in Cross Canyon?

A. They were on Federal range.

Q. Do you know whether or not there are any Indian allotments there?

A. Yes.

Q. Those eight hundred acres in Cross Canyon——

A. That is without allotment.

Q. It does not matter, it isn't Federal range.

A. I never did take a horse off of those allotments.

Q. You don't know where the allotments begin there in Cross Canyon, do you?

A. Yes.

Q. There are no fences to indicate that.

A. I have gone over it with a compass, followed the lines out.

Q. Well now, down in this corn patch we are talking about, isn't it a fact that field is owned by Ned Wilson held under a desert entry by Ned Wilson?

A. It wasn't at that time.

Q. It wasn't? When was it?

A. I think his entry was approved in the fall of 1952.

Q. Sure it was. While you were gathering these horses that was private land.

A. I never took any horses off of that land.

Q. You said you took 22 burros right from there.

A. Right from that corn patch. I did not.

Q. Did you or did you not?

A. No.

Q. Did not take any burros from that area?

A. Not off of that corn patch.

Q. Corn patches are not fenced, are they?

A. Yes.

[fol. 338] Q. No fences there now?

A. There was the last time I was down there.

Q. There wasn't the last time I was there. When were you there last?

A. Oh, this summer, two or three months ago.

Q. Those corn patches are wide open on the east side, aren't they?

A. On the north side they are fenced. I don't know. I haven't been on the east side of them.

Q. I see. You call it fenced because you saw a fence on the north side, is that right?

A. Yes.

Q. Say, when you were down there with the Sheriff, when these women were handcuffed, you took some burros there, didn't you, Mr. Black?

A. No, I did not.

Q. You did not?

A. No.

Q. What was your purpose in being there?

A. I have a right to be on Federal range any place.

Q. You were just in the exercise of your right to be on the Federal range then, is that right?

A. My purpose there was to identify the Indians involved in it. That is what the Sheriff asked me to be there for.

Q. You don't work for the Sheriff, do you?

A. Sometimes we work together.

Q. Apparently you have been working together on this drive, haven't you?

A. Yes.

Q. You work under Mr. Kinnaman's supervision?

A. Yes.

Q. You told the Court in each instance that when you gathered these horses or gathered these burros that there were no Indians in the vicinity, is that right?

A. I said I didn't see any Indians while I was gathering the horses.

Q. You wouldn't see them if they were there, would you?

A. Yes.

Q. You know you wouldn't see those Indians if they were there?

A. I testified in one case where one Indian showed up and claimed his horse I let him have his horse.

Q. When you sold these horses to Kuhni, you knew that was just a by-products company, didn't you, Mr. Black?

A. Yes.

Q. You knew they would immediately kill those horses?

A. I didn't know what they did with them.

[fol. 339] Q. You didn't know that?

A. No.

Q. Would it make any difference in the price you received for a horse there whether he were Dan Patch or Man of War, or one of these horses?

A. No.

Q. It would be the same price, wouldn't it?

A. Yes.

Q. What did you do with all these rifle bullets you bought on this drive on these horses?

A. I didn't buy any bullets.

Q. Do you know how many were bought?

A. Yes.

Q. What did you do with all of them?

A. We have most of them now. I have used quite a few over in District 9.

Q. That is nothing to do with District 6, is it? The Advisory Board for District 6 does not furnish the bullets for both districts?

A. We have both districts, and we use things back and forth, and there were some.

Q. The Advisory Board of District 6 bought these bullets for you?

A. Yes.

Q. The Advisory Board of District 6 does not use its money for District 9, they have a board of their own?

A. No.

Q. You haven't been using these bullets except for District 6?

A. I think so.

Q. You bought some forty boxes of rifle bullets, didn't you?

A. I didn't buy any.

Q. You knew of them being purchased for this particular job?

A. They furnished me ten boxes. I don't know what the others got.

Q. How many did the others get?

A. Twenty.

Q. Now, you testified about picking these horses up on different dates. You referred to one place as Cahoon Mesa and another one as McCracken Mesa, another place as Cross Canyon, Horse Canyon, and several other disputed places. They are all within this disputed area?

A. Yes.

Q. There are some of them outside and some of them inside the Indian reservation?

A. No.

Q. What do you mean by that?

A. Cahoon Mesa goes down to the Aneth Extension, which is on the reservation.

Q. Did you pick up horses inside the reservation?

A. No.

Q. Do you know whether or not the Aneth Extension is in this disputed area?

A. Yes.

[fol. 340] Q. Did you receive a bounty for gathering these horses?

A. No.

Q. Can you explain why it is the Advisory Board wrote checks to you during the time this program was going on?

A. I don't recall right now of any checks they wrote to me.

Q. If they did write any to you, what would they be for?

A. I sold them a pick-up rack once, a few things.

Q. What other things?

A. I don't recall anything else right now that I could name that I have ever sold them.

Q. When you hauled these horses yourself to this glue factory down here in Provo, you used your Government car?

A. Yes.

Q. The Government buys the gas for that car?

A. Yes.

Q. I hand you a check made payable to yourself, Mr. Black.

The Court: You had better have it marked for identification.

Mr. Oman: The Advisory Board of Utah Grazing District No. 6.

(The document referred to was marked, Plaintiffs' Exhibit No. 7, for identification.)

By Mr. Oman:

Q. I ask you if you can tell us what that payment was made to you for?

A. I borrowed Melvin Adams' truck and bought some gas, and on the trip up on buying gas for this truck, the Advisory Board paid for the gas that was used in the truck.

The Court: On the trip up where?

The Witness: Up to Kuhni's Packing Plant.

By Mr. Oman:

Q. I understood you to say you hauled these horses in a Government truck.

A. We did part of them, some of them.

Q. And that the Government bought the gasoline?

A. On the trips up for our own trucks, not for the other trucks that we hired to take up.

Q. You hauled the horses in other trucks, as well as in the Government trucks?

A. Yes.

[fol. 341] Q. And you yourself drove those trucks?

A. Yes.

Q. How about a check here also payable to Robert Krumin from the Advisory Board? He is the Assistant District Grazier, isn't he?

A. Yes.

Q. That was in January, 1953. Do you know anything about that?

A. He had Melvin Adams' truck, and come up and brought a load of horses, and they reimbursed him for the gas he bought.

Q. Is Melvin Adams a permittee in the disputed area?

A. Yes.

Q. And the man from whom you borrowed the truck you used, he is also a permittee, isn't he?

A. Yes.

The Court: That is to say by a "permittee" they are white livestock men who run cattle or sheep down there?

The Witness: Yes.

The Court: What do they run, cattle or sheep?

The Witness: Both of them. Will Young runs cattle and Melvin Adams runs sheep.

Mr. Oman: That is all.

Redirect examination.

By Mr. Thomas:

Q. You had a conversation, did you say, with Ira Hatch, respecting these horses that were on the open range, Mr. Black?

A. Yes.

Q. Do you recall when that conversation was?

A. Yes, it was on the road just off of the State Highway before you get to Recapture.

Q. When?

A. I don't remember the date. It was sometime in 1952, in the winter, sometime in the winter of 1952 and 1951.

Q. Was it before this program was inaugurated?

A. No, the time I am talking about wasn't, no.

Q. Pardon me.

A. I had met Mr. Hatch on many occasions and talked to him, but the time I refer to is during the time this program was in effect.

Q. Well, was it in the winter of 1951 and 1952?

A. Yes.

Q. Or 1952 and 1953?

A. 1952 and 1953.

Q. Now, what was that conversation?

A. We discussed the abandoned horse program, and he said he had lots of horses bothering him too on his private [fol. 342] range. He said that he couldn't keep his fences

up and could not keep the horses off of his land, and I told him that I understood the program—if I understood the program right that if he gave us written permission that we could go on his private land and gather horses too if they were bothering him.

Q. Is that all the conversation?

A. That covers it pretty well.

Q. What did he say about that?

A. He said he couldn't do that, that he didn't want to cause the Indians trouble, and that he would like to have the horses moved off of his land, but he didn't want to give us permission to go there and drive the horses off.

Q. Now, with respect to the shooting of any horses, Mr. Black, did you have occasion to shoot any of these horses during the period between September 19, 1952, and February 20th, I believe it is, 1953?

A. Yes.

Q. Just tell the circumstances and how many horses were involved.

A. I think we killed nine horses. They were crippled ones and ones with broken legs and ones that had got trampled and was about dead anyway.

Q. Did you shoot any horses in the belly?

The Court: Well, he has talked about that. You have got that all in. He said he did not the first day.

Mr. Thomas: Oh, the first day. I see.

The Court: He testified to all of that. He testified to what ones they shot and what they didn't, and all about it.

The Witness: There were two horses that I shot about that time that belonged to a couple of white men that was crippled on the range by somebody else shooting them, and the Sheriff was called to investigate that, and he asked me to go with him, and we went down to the mission, down to Bluff, the one that had reported a mule coming into their camp shot with a .22 rifle, and they asked the Sheriff to come down and investigate it, and I went with him, and the mule had died there just awhile before we got there, and they told about other horses that were being shot. This is in the Bluff range area. And we went up there, and there was a horse shot in the hind leg that could hardly [Vol. 343] travel, and another one shot in the withers. I

recognized the horses, and I knew them, and I went to Bluff and asked the owner would it be all right if we killed those horses, and I never included those in the horses that we killed.

By Mr. Thomas:

Q. Were these horses shot then prior to this program, the commencing of this program?

A. Yes.

Q. Where was this mission where this mule was?

A. Just up the river, a little east of Bluff, about three or four miles.

Q. Did you shoot that mule?

A. No.

Q. Did you know who did?

The Court: Well, that isn't material.

Mr. Thomas: I believe that is all, if your Honor please.

Recross-examination.

By Mr. Oman:

Q. Ira told you to leave those horses alone that were on his lands, didn't he?

A. Yes.

Q. Did you take them off any way?

A. No.

Q. Did you take horses off any privately owned lands in this disputed area?

A. No.

Q. Didn't you have arrangements with Leland and Delbert Redd and those fellows who own a lot of land in the area to take them from their lands?

A. No.

Q. Can you move horses across that country toward Blanding without going across privately owned land?

A. Yes.

Q. It would be a very difficult thing to do?

A. Yes.

Q. You mean you tried to dodge the privately owned land, going onto it?

A. No.

Q. No. You went right across the country, privately owned land and all?

A. Yes. If we picked them up on Federal range, we went right down the road with them.

Q. In fact, you cannot tell where it is Federal land and privately owned, just sagebrush, no fences, you can't tell where it is Federal and private. One piece of land looks exactly like the other.

A. No.

Q. No ifidications to tell which is privately owned and which is public domain?

A. We carry our maps with us all the time.

[fol. 344] Q. You can't tell from your maps when you are on one section of land and you are on the other?

A. Pretty close.

Q. Close enough for your purpose anyway. It didn't make much difference, did it?

A. Yes.

Q. Did you distribute these rifle shells to other men that were with you in this program?

A. No.

Q. You did not?

A. No.

Q. Who helped you in this program?

A. Well, Robert Krumm was with me most of the time.

Q. He is a Government employee?

A. Yes.

Q. Who else?

A. Well, LaVar Lyman went with me a time or two, George Lyman, Prop May, Carl Perkins.

Q. Leland Redd?

A. Leland Redd, and Alma Redd.

Q. Did they shoot horses?

A. No.

Q. They just helped you gather and load them?

A. Yes.

Q. Get rid of them. They are all permittees?

A. No.

Q. They graze in this area with livestock under permits your office issues?

A. No.

Q. Which ones are?
A. Prop May hasn't any license.
Q. He is the Deputy Sheriff?
A. Yes.
Q. LaVar Lyman is, isn't he?
A. He has a small permit on Bluff range.
Q. Perkins and Delbert and Leland Redd?
A. Yes.
Q. And all the others you named except May?
A. There are a few others that drove trucks, Earl Wright and Jesse Johnson, and that is all I can remember.

Mr. Oman: That is all.

Redirect examination.

By Mr. Thomas:

Q. Were they permittees?
A. No.

Mr. Thomas: That is all.
The Court: How much land, deeded land, Taylor grazing and forest permit land do the Redd family have down in that area?
The Witness: I can't answer that. I don't know.
The Court: Well, quite a lot, isn't it?
The Witness: Yes.
[fol. 345] The Court: It covers just about the whole of the southeastern part of the state?
The Witness: No.
The Court: Over in Colorado?
The Witness: Mr. Thorpe is the big owner down there, and Leland Redd hasn't held very much private land in that area.
The Court: He owns some further up, is that it?
The Witness: He owns a field or two around Blanding.
The Court: Anything further?

Recross-examination.

By Mr. Oman:

Q. How many head of livestock do you cover in the permits you issue to white men to graze the range within the disputed area, how many head of sheep?

A. I can't answer that. I have a list of all permitted sheep and cattle in the area, but as to a total number I couldn't answer that.

Q. You have also a consolidated report that shows total sheep permitted, total cattle permitted, and then broken down into A.U.M.'s. I don't know it exactly, Mr. Black, but isn't it around 40,000 head of sheep?

A. I think so.

Q. And about how many thousand head of cattle?

A. That is for the district, the whole district, you mean?

Q. I mean for this particular unit here involved in this disputed area.

The Court: You mean District 6?

Mr. Oman: Not the whole District 6 by any means, 6, the district, the disputed areas in District 6, but I mean just the area in which the disputed area is located.

The Court: Let's put it first for District 6. Tell us what territory is covered by District 6.

The Witness: San Juan County.

The Court: That is just San Juan County?

The Witness: Yes.

[fol. 346] The Court: Now, tell me, give us the figures on the whole district there.

The Witness: I am sorry, your Honor, I can't do that. I don't know.

The Court: You don't know about that?

The Witness: No.

The Court: Go ahead, Mr. Oman.

By Mr. Oman:

Q. For this particular area it is about 40,000 head of sheep?

A. For the district, yes.

Q. No, for this particular area.

A. No, that is for——

Q. One man has a permit for 30,000 head of sheep, Charlie Redd.

A. That is not in this area. That is for the district.

Q. I am confining this to this area roughly. 40,000 in the district, one man has 30,000.

The Court: Can't we get that accurately?

Mr. Oman: Yes.

The Court: Let's get it in accurately.

By Mr. Oman:

Q. Don't you have those files here, Mr. Black?

A. I haven't with me now.

Mr. Oman: Mr. Kinnaman has them here.

The Court: We might as well get that accurate. This man would have just a notion about it. All right, is there any further examination of this witness?

Mr. Oman: No further.

The Court: You stay in the courtroom if you want to, Mr. Black.

(Witness excused.)

ROBERT C. KRUMM, testified as follows:

Direct examination.

By Mr. Thomas:

Q. State your name please.

A. Robert C. Krumm.

Q. Where do you reside, Mr. Krumm?

A. Monticello, Utah.

[fol. 347] Q. How old are you?

A. Twenty-six.

Q. Are you employed with the Bureau of Land Management for the United States Government?

A. I am.

Q. Were you so employed in 1952?

A. Yes, sir.

Q. And all during 1953?

A. Yes, sir.

Q. What is the status of your employment?

A. My title is Range Manager. I am the assistant of Utah Districts 6 and 9.

Q. Assistant to Dale Kinnaman, are you?

A. Yes, sir.

Q. Now, I hand you here Plaintiffs' Exhibit A, Mr. Krumm, and calling your attention to September 19, 1952, at that time were you acquainted with the program for the elimination of abandoned horses on Federal range in Utah District No. 6?

A. Yes, sir.

Q. And did you assist in the gathering or eliminating of abandoned horses under that program?

A. Yes, sir.

Q. And in connection with the work in that program, did you work under your superior, Mr. Kinnaman?

A. Yes, sir.

Q. Were you associated in that program with Dale Black?

A. Yes, sir; Dee Black.

Q. Or Dee Black, excuse me.

A. Yes, sir.

Q. Now, on September 19, 1952, did you aid in the gathering of any horses on this Federal range at that time?

A. No, sir.

Q. You did not? Did you aid in the gathering of any horses at all during that program?

A. Yes, sir.

Q. On what dates, can you indicate?

A. Do you want all of the dates that I assisted?

Q. Yes. Take them one by one.

A. September 25, 1952.

Q. All right. I direct your attention to that time. Did you aid in the procuring or gathering of any horses or any burros from the Federal range on that date?

A. Yes, sir.

Q. How many horses were gathered, and how many burros?

A. Five horses and one burro.

Q. Now, do you recall from where they were gathered?

Well, I will withdraw that. It is cumulative. I appreciate it, if your Honor please. There are one or two items, and I believe we can shorten this. Were there any Indians in the vicinity of these horses and this one buffalo when they [fol. 348] were gathered, do you know, Mr. Krumm?

A. No, sir; there weren't.

Q. There were not?

The Court: Well, you have covered all of that. I wanted to ask you, well, when did you pick up any horses, or aid in picking up any horses?

A. On September 26, 1952.

Q. Now, at that time there were 11 horses picked up?

A. Yes, sir.

Q. Did you see Indians after you picked up these horses?

The Court: We have had a lot of testimony from you folks about the proposition that there weren't any Indians around when the horses were picked up. Now, you have established that beyond any peradventure of a doubt. Why do we have to go over that all over again?

Mr. Thomas: In this one instance there were some Indians came up after the horses were gathered.

The Court: I don't see what you claim for that. That is against you.

Mr. Thomas: They were released to the Indians.

The Court: We are not talking about the horses released to any Indians. We are talking about the 150 head of livestock you took up and sold to a glue factory. I don't see anything of materiality in that. I don't want to cut you off, anything you claim anything for, but there is no use going over and over this stuff again.

Mr. Thomas: May I refer to my notes.

The Court: Surely.

Mr. Thomas: It may be, if your Honor please, this is cumulative.

The Court: It sounds to me as though it is, Mr. Thomas. If you put on anything you claim anything for, but there isn't any use having two men say that there weren't Indians around when you picked up the horses. One is enough. As a matter of fact, there isn't any claim that

Indians were around. On the Sakezzie you chose the dead of the night, a rainy night, drove them off in the night time.

[fol. 349] By Mr. Thomas:

Q. Were you there when any horses were picked up at night?

A. Yes, sir.

Q. Will you tell the Court the circumstances surrounding that?

The Court: There isn't any doubt about that. I don't see any use in going into that any further. That has all been testified to.

Mr. Thomas: That is all.

Mr. Oman: No questions.

The Court: Step down.

(Witness excused.)

JOHN W. CROWLEY, testified as follows:

Direct examination.

By Mr. Thomas:

Q. Will you state your name?

A. John W. Crowley.

Q. Where do you reside, Mr. Crowley?

A. East of Monticello

Q. In San Juan County, Utah?

A. In San Juan County, Utah.

Q. Are you a San Juan County commissioner?

A. I am.

Q. Mr. Crowley, I hand you here what is marked Defendant's Exhibit C in this case. Does your signature appear on that exhibit?

A. It does.

Q. Now, I direct your attention to July 1, 1952. Were you present in the County Commission, in the San Juan County Commission meeting when this resolution that appears in that exhibit was considered?

A. I was.

Q. And did you, Commissioner, vote to pass that resolution?

A. We did.

Q. Now, state whether or not that resolution had to do with the eliminating of abandoned horses on open range in San Juan County?

A. It did.

Q. Would you tell the Court whether or not that had to do with only Indian horses, Mr. Crowley?

A. It did not.

The Court: Did it have anything to do with Indian horses?

[fol. 350] The Witness: Indian horses wasn't discussed at the meeting at all.

The Court: Is it your testimony that you folks weren't at all concerned with getting the horses of the Indians off of that range.

The Witness: Not necessarily.

The Court: I didn't say "necessarily."

The Witness: It wasn't.

The Court: At all?

The Witness: At all.

By Mr. Thomas:

Q. Mr. Crowley, who was present in that Commission meeting?

A. The three board members, Mr. Rogers, Mr. Adams and myself.

Q. And did the three board members sign that resolution?

A. They did.

Mr. Thomas: That is all.

Cross-examination.

By Mr. Orhan.

Q. You say that meeting was on July 1st?

A. It was on the first Tuesday in July.

The Court: Have you got the Clerk of that board up here?

Mr. Oman: No, your Honor, we excused her.

The Court: I know, and I told you to get her back up here.

Mr. Oman: I misunderstood, your Honor.

The Court: Go ahead with your examination.

Mr. Oman: I can get her back here.

By Mr. Oman:

Q. You say this meeting was on July 1st?

A. That is right.

Q. What day was that?

A. That was on Tuesday.

Q. Can you explain then why in your meeting of September 2nd you refer in that meeting and ask that it be put in the minutes for the September 2nd meeting that you [fol. 351] had considered a resolution previously.

A. It is just one of those things. They overlooked it.

Q. Who overlooked it?

A. I can't say.

Q. As a matter of fact there wasn't any meeting on July 1st, was there?

A. There was.

Q. Where was it held?

A. In Monticello.

Q. But there is no minute to show for it at all, is there, in the record?

A. No.

Q. As a matter of fact, Mr. Crowley, you considered this later and were requested to insert it in the September 2nd resolution so that there would be something in the record some place, and Mr. Kinneman requested you to do so, didn't he?

A. That is not true.

Q. Who did request you to do it?

A. Who asked us to?

Q. Who asked you to insert it in the September 2nd?

A. No one. We inserted it ourselves.

Q. How did you come to discover you hadn't done it before?

A. It was in our papers, a copy of this resolution was in our papers to be considered, in our papers at these

meetings. We overlooked it at the August meeting, so it was inserted in the September.

Q. You overlooked it all along until September 2nd?

A. We discussed it in the meeting in July.

Q. Every time you have a meeting there is an official minute written up on what is considered and what is done at each of those meetings, isn't there?

A. Mostly. Not all we do.

Q. Where it is convenient to insert something in a later record that you should have considered earlier, that is all you do there, is that right?

A. No.

Q. You did here, is that correct?

A. No.

Q. As a matter of fact you have had a lot of concern for many years in this country to get rid of these Indians, haven't you?

A. No, not to my knowledge.

Q. How long have you lived there?

A. Eleven years.

The Court: Where do you live?

The Witness: I live in Monticelllo.

The Court: Are you a stockman?

The Witness: No.

[fol. 352] The Court: Do you own any stock at all?

The Witness: Milk cows up at my home.

The Court: You don't have any forest permits or Taylor Grazing permits?

The Witness: No, I don't.

The Court: You haven't had any problems with these Indians down in that corner?

The Witness: Personally, no.

The Court: Any of your family have?

The Witness: No.

The Court: Any of your friends have?

The Witness: Well, they are all my friends.

The Court: Tell me the friends you have had who have had trouble down there with these Indians.

The Witness: I can't do it. I can't name them. They haven't discussed their troubles with me.

The Court: You say they are all your friends. Whom do you mean when you say they are all your friends?

The Witness: I mean the livestock men and the farmers and the businessmen in the county.

The Court: You have heard they have had some trouble down there with the Indians?

The Witness: I sure have.

The Court: Yes, surely. A matter of a good deal of comment, conversation?

The Witness: Yes, definitely.

The Court: Go ahead.

By Mr. Oman:

Q. These other two commissioners——

The Court: One of the things that has been interesting in this lawsuit is how little everyone has ever heard about these Indians down there, no problems with the Indian live- [fol. 353] stock, we just have a general program to eliminate abandoned horses. It does not concern the Indians.

Now, somebody isn't being exactly frank with the Court about that. As I said when Kinneman was on the stand the other day, the fact of the matter is this has been a sore spot down here for a long time, isn't that so?

The Witness: Yes, it has.

The Court: Sure. Go ahead, Mr. Oman.

By Mr. Oman:

Q. These other commissioners are livestock men, are they, Mr. Crowley?

A. One of them.

Q. Which one?

A. Mr. Bayliss is now the livestock man on the board. Mr. Rogers——

Q. At the time this resolution was passed.

A. Mr. Rogers was there.

Q. He is the man that requested this to be inserted?

A. No.

Q. What does it say there?

A. It says the County Clerk is hereby directed to immediately cause to be published the necessary notice in the San Juan Record.

Q. I refer you to Plaintiffs' Exhibit 1, Mr. Crowley, which your County Clerk says is a certified copy of the minutes of your meeting of September 2nd.

A. Yes, correct, right.

Q. That shows that Mr. Rogers moved this be inserted in the minutes of this meeting.

A. That is right.

Q. And this was the first time it was considered in there?

A. No.

Q. Who asked you to give this any consideration at all?

A. In the first place?

Q. Yes.

A. Mr. Kinneman.

Q. And then you, as Commissioner, just went through the formality of inserting this thing in your minutes, and the program was up to him, is that correct?

A. It states that in this minute, that the program was up to the Board, or up to the Bureau of Land Management.

Mr. Oman: That is all.

The Court: Now, I have a question I want to ask you. [fol. 354] You say Mr. Kinneman asked the County Commissioners to do something about getting the horses off of this area. Who else asked you to do that at any time?

The Witness: That is all, during my time on the Board.

The Court: I am talking about you personally.

The Witness: Yes.

The Court: I am not talking about Board meetings. I am talking about anyone asking you, as a County Commissioner, to do something about this problem. Has anyone asked you to do that?

The Witness: No.

The Court: At no time?

The Witness: No.

The Court: Have any of the Redd family communicated with you about it?

The Witness: No.

The Court: Any of the other livestock folks down there?

The Witness: No.

The Court: You fellows run for election to get to be County Commissioners, don't you?

The Witness: That is right.

The Court: Has it ever been raised as an issue in an election campaign to your knowledge?

The Witness: No.

The Court: You have heard a lot about this problem here, talked about between the livestock men and these seven or eight families of Indians down near Blanding we are talking about here?

The Witness: Yes, sir.

The Court: Now tell me what you have heard about it.

The Witness: I can't specify about it, except what I have saw in the papers, mostly that the Indians were contesting the white people's rights.

[fol. 355] The Court: I am not talking about what you see in the newspapers. I am asking you what you have heard about it down there in that area. You live in Monticello. How far is Monticello from Blanding?

The Witness: About twenty-two miles.

The Court: So this Montezuma Creek area where these seven or eight Indian families were is about two miles from Blanding, so we are talking about a place only about twenty-five miles away from your home. That is pretty close.

The Witness: It is further than that.

The Court: How far is it?

The Witness: It is about fifty miles from my home.

The Court: Now folks generally know what is going on within fifty miles from their home, don't they?

The Witness: Well, to a certain extent.

The Court: Now tell me what you knew was going on down there from what you heard from folks who lived in that vicinity. Did anybody talk to you about it at all?

The Witness: Not specifically.

The Court: Well, what have you heard about it down there?

The Witness: I can't tell you, your Honor. I just—it has been discussed, of course, the general actions down there, but I can't tell you just specifically.

The Court: Did you County Commissioners discuss it?

The Witness: No, we haven't.

The Court: Never?

The Witness: No, not to my knowledge.

The Court: At no time?

The Witness: No.

The Court: Out of the meetings?

The Witness: I don't recall any time.

[fol. 356] The Court: Well, you mean to tell the Court then that the only thing you know about it and have heard about it is that living within thirty-five, forty, or fifty miles from there, is what you learn from a Salt Lake paper that comes back down there, and you read the paper. Is that what you mean?

The Witness: Well, there is our own local paper it is in, sure. I was on the Board when this action was brought in the state courts restraining these Indians from using this. The Sheriff was the County Officer too.

The Court: Well now, you say you were on the Board then?

The Witness: I have been on the Board five years.

The Court: You were on the Board at that time. Didn't your Board talk about it then?

The Witness: I don't recall that we did.

The Court: Well, your Board had something to do with that action, didn't it?

The Witness: Not directly.

The Court: What did they have to do with it?

The Witness: They didn't have anything to do with it then, I will say. The County Sheriff did, and he, of course, was associated as a County officer with it.

The Court: Well, was there discussion among you?

The Witness: I don't recall any.

The Court: This is a most amazing situation. Lots of things happening down there, lots of official action being taken, even a County officer like a sheriff, who works closely with the Commissioners, and yet you don't know anything about anything ever having taken place, and you don't recall anything ever having been discussed with you. Are you a fairly active County Commissioner, or are you an inactive County Commissioner?

The Witness: Well, maybe I am inactive. I live out in the country, and they don't all the time discuss this stuff [fol. 357] with me. I will say then that it was talked about generally, but I can't recall in the specific words.

The Court: Well, what was talked about generally?

The Witness: Well, I can't tell you, except the Sheriff

told me a time or two maybe that it was quite a serious situation down there, but he didn't go into details.

The Court: Could it be that you haven't been attending these meetings of the County Commissioners very regularly?

The Witness: Yes, I have been there.

The Court: Have you been there all the time?

The Witness: With the exception of one or two times.

The Court: And you want the testimony in the record to be, and you want to tell this Court that at no meeting of the County Commission, San Juan County, at which you were present, did they ever discuss the Indian livestock problem down here within forty or fifty miles of Monticello?

The Witness: That is right.

The Court: All right.

By Mr. Oman:

Q. Do I understand you don't attend any of these Commissioner's meetings?

The Court: He said all but two, one or two.

The Witness: That is right.

By Mr. Oman:

Q. Who discovered that you didn't have any minutes at all for July 1st?

A. Perhaps our clerk.

Q. No perhaps; who did discover it?

The Court: Do you know? We are just asking you what you know.

The Witness: No, I don't know that.

By Mr. Oman:

Q. Who brought it to your attention then?

A. The clerk.

Q. When?

A. I can't just tell you.

Q. Did she bring it to your attention personally?

A. Yes, she did.

[fol. 358] Q. Not at any Commissioner's meeting?

A. No.

Q. Did she say who had asked her to see that an insertion was made in there? Did she say Mr. Kinneman had called it to attention he needed that in his records?

A. No.

Q. Who asked you to come up here?

A. I came as a Government witness.

Q. Who contacted you and talked to you before you were requested to come as a Government witness?

A. Mr. Howard Call served the summons on me.

Q. I didn't ask you who served the summons on you. You understand the question don't you, Mr. Crowley?

The Court: Well, have you discussed your testimony up here with anybody?

The Witness: No.

The Court: No one has talked to you?

The Witness: Not my testimony.

The Court: Well, have they talked with you at all?

The Witness: The case has been discussed, I suppose.

The Court: Whom did you discuss the case with since you were served as a witness? That is what counsel is trying to get at. Whom have you talked with about this case since Mr. Call served you with the summons to appear here? Have you discussed the case with anybody?

The Witness: Well, yes.

The Court: Who?

The Witness: To a certain extent.

Mr. Oman: I didn't hear the answer.

The Witness: To a certain extent with Mr. Thomas.

The Court: Who else?

The Witness: The U. S. Attorney.

The Court: Who else?

The Witness: I guess that is all.

The Court: There is no need to guess about it.

[fol. 359] The Witness: That is all.

The Court: All right, Mr. Oman.

By Mr. Oman:

Q. Did you discuss with Mr. Kinneman at Monticello before you left there?

A. Yes, it was discussed.

The Court: Now, Mr. Crowley, you see, you just told me you discussed it with Mr. Thomas, and nobody else. Now you say you discussed it with Mr. Kinneman. It seems to me you are being a little less than frank about this. I want you to tell me what you and Kinneman, what Kinneman said to you when he talked to you about this case.

The Witness: Kinneman asked me if I had been served with a summons to come to this hearing. I told him I hadn't. And he told me the other members, the other men that were summoned too in the discussion.

The Court: What else did he say?

The Witness: I don't recall anything else.

The Court: Did he talk about this resolution with you?

The Witness: I don't recall that he did.

The Court: Go ahead, Mr. Oman.

By Mr. Oman:

Q. Why did you bring it with you then?

A. In my summons it said to bring a certified copy of the minutes of the Board.

Q. Is that what you think is a certified copy?

A. I didn't bring this.

Q. You didn't?

A. No.

Q. Did you bring anything?

A. I brought the certified copies.

Q. I showed it to you, didn't I?

A. Yes.

Q. That is a certified copy?

A. That is right.

Q. Of the Exhibit 1 of plaintiffs, which I showed you a moment ago?

A. That is right.

Q. Now Mr. Kinneman told you to go over and have a look at the records, did he not?

A. No.

Q. Did you go have a look at them?

A. I did.

Q. What for?

A. To get the clerk to make me a copy of these.

[fol. 360] Q. Did you have a look at the copy of the minutes of July 1st?

A. I did.

Q. What did that say there?

A. I can't tell you what it said exactly.

Q. As a matter of fact, there aren't any minutes for that date?

A. Yes, there are.

Q. You just got through saying that there weren't.

A. There is no minute on those pages at that date, but there is minutes for a meeting of the Board of Commissioners for the first Tuesday, which came on the 1st of July, of July, 1952.

Q. You made sure that this resolution was not in that minute, didn't you?

A. Yes, I did.

Q. If there is a minute there?

A. Yes.

Q. Why did you do that?

A. Well, in looking through the minutes to get these resolutions.

Q. Why did you look where you knew there wasn't any such minute?

A. I beg your pardon?

Q. Why did you look in the minutes of a meeting in which you knew it was not contained? You found it in September 2nd, and the clerk had called it to your attention. You say that there wasn't any such minute, any such resolution in any of the minutes, and so you had it inserted in September. That is what you said. So now you say Kinneman asked you to go over there and have a look at those records, and you searched back the minutes of July.

A. I didn't say, come and asked me to.

Q. Did anybody else?

A. No.

Q. You just went over there and did that on your own, is that right?

A. No. I looked back through the minutes to see this resolution, where it had been entered in our minutes before. It had been at different times over the years.

The Court: Let me see this thing, Mr. Oman, this minute you are talking about, the resolution. I have never seen that. Now, let me see, have you got the minutes of the July meeting?

Mr. Thomas: The minutes are here, if the Court please. These are the minutes, aren't they, Mr. Crowley?

The Witness: Right here.

[fol. 361] Mr. Thomas: They are right here.

The Court: They are not in evidence.

Mr. Thomas: I don't think they are in evidence.

The Court: All right, I don't want to see them. This is a strange proceeding, it seems to me. Here is a meeting of September 2, 1952, and Exhibit 1 recites it was moved by Rogers, seconded by Adams, and carried unanimously that the following resolution be inserted in the minutes:

"On this 9th day of July, 1952, the Board of County Commissioners of San Juan County, Utah, resolve and direct as follows:

"The efforts will be initiated within the next thirty (30) days to remove abandoned horses, as defined in 64-2-3 of the laws of this state, for open ranges within this county.

"And with the understanding that the Advisory Board of Monticello Grazing District, Utah 6, shall pay all costs incident to the removal of said horses, the said Advisory Board is hereby exclusively engaged to remove said horses under the direction of this commission."

That is interesting, "exclusively engaged." "Said Advisory Board is hereby exclusively engaged to remove said horses under the direction of this commission. The County Clerk is hereby directed to immediately cause to be published the necessary notice in the San Juan Record newspaper, according to the provisions of law.

"All captured or killed horses shall become the property of the said Advisory Board with the understanding that it may make such disposition of the horses or carcasses as it sees fit with the reservation that all live captured horses shall be shipped outside the boundaries of the Monticello Grazing District. San Juan County Commissioners, J. W. Crowley, Leon W. Adams, John D. Rogers.

"This resolution to stand until rescinded."

Now, are the minutes of the meeting of July 9, 1952, here, Mr. Thomas?

[fol. 362] Mr. Thomas: No meeting was ever held on July 9th. The meeting was held on July 1st, and the resolution was dated July 9th, and signed by the three Commissioners. That is correct, is it not?

The Witness: That is correct.

Mr. Thomas: That is the procedure that was followed.

The Court: Well now, read that to me.

(The resolution referred to was read by Mr. Thomas.)

The Court: That is what the resolution shows on its face. Now, what do you claim about this matter, Mr. Oman, what were these fellows up to according to your version of the situation?

Mr. Oman: Under the State law under which they hoped to cover themselves in the action of killing these horses, the publication of a notice is necessary, and the County Commissioners must initiate and have that done, the notice which your Honor has read there.

My position on this particular phase of it is this, that Mr. Kinneman went out and had this notice published beginning July 10th, the day immediately after they now say they dated this resolution in the meeting of September 2nd. So this notice, which Mr. Kinneman had published, was published and out of the way before the County Commissioners ever passed a resolution to authorize it. But now they say, "Oh, well, we forgot about a meeting that we held back there on July 1st." July 9th, they never held any meeting at all on July 9th. "So we will insert it in this thing to cover you fellows." They inserted it in the minutes of a later meeting. That is what I claim for it, your Honor.

The Court: Of course, the meeting of September 2, 1952, was too late as a meeting at which to stop this.

Mr. Oman: That is right, the publication was already finished.

The Court: All right, I see.

By Mr. Oman:

Q. Now, you had no meeting at all on July 9th, did you?

A. No.

[fol. 363] Q. Why did you date it July 9th?

A. That is the day we signed this.

Q. You didn't sign it until September 2nd.

A. We signed this resolution on this day.

Q. But made no record of it?

The Court: Wait a minute, I want to find out how he remembers that. Go ahead and inquire about that. Just how he remembers it. What is it that fixes September 9th, or July 9th, rather, in your mind? Just how is it that you remember it was on the 9th day of July that you signed that document?

The Witness: The date on this.

The Court: That is all you know about it, is the date on the document, is that right?

The Witness: I know we did it shortly after the meeting on that date on this.

The Court: Well now, you have testified it was on July 9th you signed it. Now, how do you know it was on July 9th? That 9th day of July, that is a very certain day. I don't know what I was doing on July 9, 1952. I am wondering what fixes that event in your mind?

The Witness: Just the fact that it had this date on it.

The Court: That is all you know about it, is the fact that it had the date on it. All right, go ahead, Mr. Oman.

By Mr. Oman:

Q. Where were you when you talked about what you should say here in this case with Mr. Kinneman? Were you in his office or in your office?

A. I didn't talk about what I should say here with Mr. Kinneman.

Q. Where were you when you talked at all with him about this case?

A. Oh, on the streets of Monticello.

Q. Each time on the streets?

A. I just talked to him one time that I recall.

Q. I beg your pardon?

A. I just talked to him one time that I recall when he asked me if I had been served with a summons.

Q. Didn't you go into his office before you came up here?

A. No, I did not.

Q. Did he come into your office?

A. Not that I recall.

[fol. 364] Q. Did he talk to you about this case, told you what he was up against, didn't he, what he needed you to say here, didn't he?

A. No.

Q. You didn't have any id.a what you were going to be called upon to testify here then until you got in court here?

A. No, I didn't, with the exception with what it said on this summons, to bring the certified copy of those minutes.

Mr. Oman: That is all.

The Court: Well now, I am not quite clear yet. You say Kinneman did talk to you down in Monticello about coming up here before you came?

The Witness: Yes, he asked me.

The Court: Now, I want the whole conversation between you and Kinneman on that occasion.

The Witness: He asked me if I had been served with a summons, and he told me the other fellows that he knew that had been summoned. That is all I recall of our conversation.

The Court: You mean there is some that you don't recall, something that you have forgotten?

The Witness: I don't recall that there was any other conversation.

The Court: Well, is it your testimony that was all that was said?

The Witness: That is my testimony.

The Court: All right.

Redirect examination.

By Mr. Thomas:

Q. Has this resolution been rescinded by the County Commissioners, Mr. Crowley?

A. No.

Q. It is still in full force and effect?
A. It is.

Mr. Thomas: That is all.
Mr. Oman: That is all.

(Witness excused.)

[fol. 365] JOHN D. ROGERS testified as follows:

Direct examination.

By Mr. Thomas:

Q. State your name please.
A. John D. Rogers.
Q. Where do you reside at the present time, Mr. Rogers?
A. In Manti, Utah.
Q. When did you go to Manti?
A. I moved there the last of June.
Q. Of this year?
A. Of this year.
Q. Prior to the last of June of this year, where did you reside?
A. In Blanding, Utah.
Q. And how long have you resided in Blanding, Utah?
A. Well, ever since 1906.
Q. How old are you, Mr. Rogers?
A. I am sixty-one.
Q. What was your business when you resided at Blanding, Utah?
A. Well, livestock and farming.
Q. Were you at one time a County Commissioner of San Juan County?
A. Yes, sir.
Q. Were you one of the County Commissioners of San Juan County in the month of July, 1952?
A. Yes, sir.
Q. I hand you here, what is marked Defendant's Exhibit C in this case, Mr. Rogers, which appears to be a resolution of the San Juan County Commissioners. Does your name appear on that resolution?

A. Yes, sir.

Q. Did you sign it?

A. Yes, sir.

Q. Now, I call your attention to the 1st of July, or a few days prior to the date of that exhibit. Was there a meeting held of the San Juan County Commissioners at that time?

A. Yes, sir; there was.

Q. And was this resolution discussed, or was there any activity or any action of the County Commissioners respecting this resolution?

A. Yes, there was.

Q. At that meeting?

A. Yes, there was.

Q. Just tell the Court what took place. Well, I will withdraw that. Was this resolution passed at that County Commissioners' meeting?

A. Yes, it was.

Q. And was there any discussion at the County Commissioners' meeting at that time when this resolution was passed as to the elimination of any horses belonging specifically to any Indians?

A. Well, the discussion, as I remember it, was general. [fol. 366] The main discussion that I remember of the meeting was that I told them they asked for a resolution.

Q. Who asked for a resolution?

A. To eliminate horses.

Q. Who asked for it?

A. Dale Kinneman came in there and asked for a resolution to eliminate horses from the range.

Q. All right. Proceed.

A. My argument was we didn't need a resolution. I had been a Commissioner quite awhile, and we had passed a resolution twice before. I told him I didn't think we needed it. We already had it.

Q. Has the same type of resolution been passed before?

A. Yes, the same type of resolution was passed by the Commission, yet changed to some extent, and they thought it would have been better to bring it up to date.

Q. Are you sure that discussion took place on July 1st, Mr. Rogers?

A. Yes, I am.

Q. In 1952?

A. Yes, sir.

Q. All right then, proceed. What took place?

A. Well, we discussed that thing back and forth for awhile. They asked for a resolution, and I said, "Well, I think we have got all the resolution we need, but if you want another one, it is all right with me to pass another resolution." We voted for the resolution to be passed. It wasn't——

Q. Was it unanimous?

A. Yes, it was.

Q. The three Commissioners voted?

A. Yes, they did.

Q. Are you familiar with the signature of the third Commissioner, other than you and Mr. Crowley?

A. Well, I have seen his signature a few times.

Q. Who is the other Commissioner?

A. It was Leo Adams.

Q. Now, Mr. Rogers, I direct your attention to the Federal range within the area of San Juan County known as Utah District No. 6. Are you familiar with that district and the Federal range incorporated therein?

A. Yes.

Q. At the time when you resided in Blanding, were you a permittee on any part of that range?

A. Yes, I was.

Q. You had a permit to graze livestock thereon?

A. Yes.

Q. And did you have occasion to ride that range, Mr. Rogers?

A. Yes, I did.

Q. Over a period of years, was that?

A. Yes.

[fol. 367] Q. And did you do so in 1952?

A. Yes, I did.

Q. Now, did you accompany Dee Black or Bob Krumm on any of their trips to gather up any horses, on which trips they did gather up horses from this open range?

A. No, I did not.

Q. You did not accompany. State whether or not, in your riding on this range, you observed, prior to September, 1952, any horses grazing on this range?

The Court: What do you claim for it? I don't see it is material. They admit the horses were there, where they gathered them, how many they gathered. What are you getting at?

Mr. Thomas: Mr. Rogers, I am going to ask him to testify to the reasonable market value of the horses on the open range, such as he saw on the open range.

The Court: All right.

Mr. Thomas: Is it all right for him to proceed?

The Court: Yes, surely.

The Witness. Yes, I did see horses.

By Mr. Thomas:

Q. And were there many or few?

A. Well, they are scattered. That is a big county, you know, and it is divided up, and I don't ride all over the country very often. Occasionally cross some of it in a car, and the range I ride on with a horse is a limited amount of that range.

Q. Did you see many or few?

A. I would say quite a few horses.

Q. That means many, does it?

A. What do you call many? Is 100 many? Is 500 many?

Q. Would you estimate how many you saw?

Mr. Oman: I object to it, your Honor. I don't think it matters how many horses there are before. We are only claiming a certain number of horses were destroyed, and they have admitted that.

The Court: Why don't you qualify him?

By Mr. Thomas:

Q. Mr. Rogers, you say you have been in the livestock business around Blanding?

A. Yes, sir.

[fol. 368] Q. For how long?

A. All my life, since I was big enough to.

Q. And in that experience have you had occasion, and have you bought and sold horses and used horses for saddle animals?

A. Yes, I have.

Q. And did you do so, and had you done so in the year 1952?

A. Yes.

Q. Do you have an opinion, Mr. Rogers, as to the reasonable market value of a good saddle horse in that area in and around Blanding, which is not a blooded horse, but an average horse used by a white man. Do you have an opinion?

A. Yes.

Q. And what is your opinion with respect to the market value of such a horse in the period commencing September, 1952, and extending to February, 1953?

A. A good saddle horse, what we call a cowhorse means—it doesn't mean a blooded horse, it means a horse that is broke to ride cattle, you can cut cattle with them and rope some of them, and a horse stout enough to pack a man, ordinarily will sell all the way from $100.00 to $150.00.

Q. Now, how do these horses that you saw on this range compare with such a horse, are they better, or not as good?

A. Well, they are very inferior to the horse I am talking about, as to the kind we ride and sell there.

Q. Do you have an opinion as to the market value of such a horse?

The Court: You are in trouble on that question. The only thing that is material here is the market value of the horses that were taken by the Government, and this witness did not see those. There is no evidence here he saw those, and it does not make any difference in this lawsuit whether other horses that he might have seen were superior or inferior to the ones he is talking about. Now, if he saw these horses that were taken by the Government from these Indians about which this lawsuit is concerned, why——

By Mr. Thomas:

Q. Did you see any of these horses picked up?

A. I saw a bunch of these horses in the corral there in Blanding.

Q. Do you recall when that was?

A. Well I don't recall the date, the exact date, but I [fol. 369] know they were horses that had been gathered up.

Q. By Dee Black?

A. Yes.

The Court: Find out if he knew whether they were Indian horses or other horses that he saw in that corral.

By Mr. Thomas:

Q. Do you know whether they were gathered from this area?

The Court: That isn't what I asked you to find out. You don't know whether they were the Indian horses or not, do you?

The Witness: I just supposed they were. They looked like the same horses.

The Court: Did you ever see the horses that belonged to Sakezzie?

The Witness: I didn't know Sakezzie's horses. I just knew the horses that were on the range.

The Court: Did you know the horses that belonged to Eddie Nocki?

The Witness: I didn't know the horses of any individual. I knew the horses that were on the range. They were the horses that Dee gathered up. I saw one bunch in the corral.

By Mr. Thomas:

Q. Was that between September, 1952, and February, 1953?

A. Yes, it was.

Q. Do you have an opinion as to the market value of those horses?

A. Pretty well. We got in the corral and looked at them at some length, and to see what they had there. There were just cayuse ponies. There were one or two horses that had saddle marks on them, indicating they had been ridden some. The rest were just mares and cayuses, and that would be a little fellow that didn't weigh 300 pounds.

Q. What would have been your opinion as to the market value of the horses at that time?

Mr. Oman: I don't believe he knows yet what horses Mr. Thomas is referring to. Do you know what happened to these horses you saw in the corral?

[fol. 370] The Witness: They were under Dee Black's supervision. Dee Black was in the corral when I got in the corral and looked at the time.

The Court: You just saw them on one occasion?

The Witness: I saw them several times. I knew what was going on.

Mr. Oman: You saw several bands?

The Witness: No, that is the one band I knew in there.

Mr. Oman: You saw the same band?

The Witness: I saw the same band for a day or two there.

Mr. Oman: How many head were in that band?

The Witness: There was between fifteen and twenty head.

Mr. Oman: That was what time, Mr. Rogers, what date?

The Witness: That was during the time this horse roundup was going on. I didn't keep track of the exact date. It was between that period.

Mr. Oman: When was the horse round-up going on?

The Witness: Going on in the latter part of 1952, the last part of 1952.

Mr. Oman: Did it terminate?

The Witness: I don't know whether it terminated.

Mr. Oman: Do you know what happened to these horses you saw in this corral?

The Witness: The only way I know is what I heard what happened to them.

Mr. Oman: I don't care what you heard. I am asking you if you know what happened to them?

The Witness: I didn't see them disposed of.

Mr. Oman: Then I don't think he knows anything about these.

The Witness: I know the value of the horses. That is [fol. 371] my opinion of the value, my judgment of the value of the horses. That is all.

The Court: That is not the important point here now. The important point is whether we are talking about the horses here in this litigation. This man doesn't know whether they were Indian horses or whether they were not.

Mr. Thomas: He has testified they were horses picked up by Dee Black.

The Court: And all you fellows are trying to make this Court believe this program was not directed at the Indians.

You have been trying to tell me you have been picking up white men's horses, too.

Mr. Thomas: The evidence is uncontradicted.

The Court: Your own testimony, as far as this witness is concerned about this matter, you have been at great pains to spell out to this Court, starting with Kinnaman, that you weren't directing this program against the Indian horses. No, you didn't even mention the Indian horses, and moreover, "We have picked up all horses, no matter to whom they belong." Now, that is your testimony, and you worked up to this point. Now, all of a sudden you want us to believe that the horses you looked at were the Indian horses. He doesn't know.

Mr. Thomas: He doesn't know to whom they belonged.

The Court: The objection will be sustained.

Mr. Thomas: If Your Honor please, I would like to proffer at this time, that we offer to prove by this witness that he saw these horses in the corral, that the horses were picked up.

The Court: He already said so. You have got that in. All you need to proffer is what you say is the fair market value.

Mr. Thomas: He would say that the fair market value of these horses at this time was—may I confer with him at this time?

The Court: Yes, find out.

[fol. 372] Mr. Thomas: That $20.00 a head would be a fair market price for them at that time.

The Court: All right. Well, you have got no evidence here they were the horses in question in this lawsuit, and that evidence is not received for this reason. As a matter of fact, your whole case has been presented here upon the assumption that everybody's horses were gathered up that were running out there on that range, white men's and everybody else's. All right.

By Mr. Thomas:

Q. Mr. Rogers, during this period of time, did you know whether or not there were any horses that could be purchased in this area?

A. You can always purchase horses there. There isn't

a great demand for horses, but you can always buy horses if you need a horse.

Q. Did that condition obtain in the year 1952 to your knowledge?

A. Yes, it did.

Q. Do you know whether——

The Court: If you want to qualify this witness as to those horses, he says Dee Black was there. Put Dee Black on and ask him if those were the Indian horses.

Mr. Thomas: I intend to.

The Court: You know what he has already told us. He said he didn't know whether they were Indian horses or not.

Mr. Thomas: I intend to find out which horses were there.

The Court: You would have a hard time on the record, on the examination you have made, on the examination of these witnesses. They have testified they didn't know whether they were Indian horses.

Mr. Thomas: They didn't know to whom they belonged.

The Court: That is what you asked and up to date. Go ahead.

By Mr. Thomas:

Q. Mr. Rogers, did that condition with respect to the market of horses continue to the best of your knowledge between September, 1952, and February, 1953?

A. Yes.

Mr. Thomas: That is all.

[fol. 373] Cross-examination.

By Mr. Oman:

Q. Mr. Rogers, on what day of the week did you hold your Commissioners' meeting, the San Juan meeting?

A. We hold our Commissioners' meeting on the first Tuesday of each month.

Q. The first Tuesday of each month?

A. That is a regular meeting.

Q. Did you have any special meetings in the year 1952?

A. We usually have some special. I can't recall to date

the exact date of any special meetings. The record will show it.

Q. Unless the record shows it, you held no meeting?

A. It wouldn't be a regular Commissioners' meeting if there wasn't a record of it.

Q. Do you remember attending a meeting on July 9th in 1952?

A. No, I don't.

Q. Do you remember attending a meeting on September 2, 1952?

A. Well, I wouldn't be sure about it, September 2nd, but I attended the September meeting, I believe.

Q. That is what day, the first Tuesday of each month?

A. The first Tuesday we meet.

Q. And did I understand you that Mr. Kinnaman attended that meeting and asked you to insert a resolution in the minutes of that meeting?

A. Which meeting?

Q. The September 2nd.

A. Well, it was the July meeting when Mr. Kinnaman asked us for this resolution.

Q. Well, who asked your to insert it in the minutes of September 2nd?

A. I don't know anything about who asked anything there. I don't remember that anybody did.

Q. You didn't insert one, is that right? You had it in the July meeting, you inserted that resolution in the July meeting minutes?

A. No, that is the time that we discussed it and passed a resolution.

Q. Have you examined the minutes of the meetings of July and September lately?

A. Well, I checked through some of the minutes.

Q. When?

A. The other day, a few days ago.

Q. Here in Salt Lake?

A. Yes.

Q. Now, Mr. Rogers, did you find any resolution in the minutes of the July meeting, to indicate that any resolution had been passed?

A. No, I didn't.

[fol. 374] Q. Did you see anything in those minutes that it had even been considered?

A. No.

Q. Where did you find, if at all, anything to show that it had ever been considered?

A. It was inserted at a later date.

Q. When was that?

A. Well, it was a later date in September. Yes, September it was, I think it was.

Q. Did you attend that meeting?

A. What?

Q. Did you attend that meeting?

A. Yes. But our minutes, we don't read our minutes the day of the meeting. We read them the following month.

Q. You read the minutes of the past meeting each time you meet, you read the minutes of the past meeting, is that right?

A. Yes, that is the way we do with the minutes. The clerk keeps the minutes on Tuesday maybe in longhand, and she types them up and puts them in the book the following meeting.

Q. So then in August you read the minutes of the July meeting?

A. Well, I suppose we did. That is the custom, the way we aim to do.

Q. Did Mr. Kinnaman attend the September 2nd meeting?

A. I don't remember whether he was there or not.

Q. Did he attend the October meeting?

A. I don't remember. He comes only to meetings occasionally. He has been in there at different times, but I don't remember the times.

Q. What has been his business when he has been there, particularly in the year 1952?

A. I don't remember any order of business. When he asked about this resolution. He comes in for different things occasionally.

Q. What did he say to the Board when he came in about this resolution? You say you remember that.

A. He said that he wanted to have a horse round-up and clear the stray horses off the range. He wanted the County to renew that resolution.

Q. Renew what resolution?

A. The resolution that we had passed before for rounding up horses.

Q. Were you a Commissioner when it had been passed before?

A. Yes, I was.

Q. Do you remember when that was?

A. We passed a resolution. The first resolution that we passed while I was a Commissioner was in 1944. It wasn't anything to do with the Grazing Service. At that [fol. 375] time the dry farmers east of Monticello came in and asked for the Commissioners to pass a resolution to take care of the stray ponies that were bothering the dry farmers out there, and we passed it in 1944. That is up on the high bench. And we renewed it.

Q. Were these Indian horses?

A. Yes, that was what I was told.

Q. Those were cultivated fields, grazing lands?

A. There were horses out there.

Q. There are no fields down in the Indian country?

A. There aren't any farmed fields.

Q. Can you tell us, Mr. Rogers, why you inserted the date, July 9th, can you recall here, in September, on that resolution that related to these abandoned horses?

The Court: There is no evidence they met in September.

Mr. Thomas: Oh, yes.

The Court: No evidence they met in July.

Mr. Thomas: Yes, sir.

A. The day we talked about that in July we instructed our County Attorney and Dale Kinneman to write up the resolution. We said we would pass the resolution, and we got that written up and inserted it in the minutes. I don't recall about the dates. That is probably the date they wrote it up.

The Court: That is to say you met him and did that?

The Witness: It was at our meeting in July, the first meeting in July that we discussed the thing, and then the County Attorney and Kinneman were to draw up that resolution.

The Court: And then you were to pass it?

The Witness: We passed it then.

The Court: You didn't have it then.

The Witness: Well, it was written. It had been passed two or three times before. We passed that resolution at two or three different times. I think in 1944 we passed it first, and in 1947 we passed one.

[fol. 376] The Court: But you can't sign the resolution until it is written up and presented to you.

The Witness: I don't recall it was ever presented any more, except we had that same resolution, passed a similar resolution. We would pass the resolution as it had been passed before.

The Court: That is to say you directed Kinneman and the County Attorney, was it, you say?

The Witness: To work out the thing.

The Court: You directed the County Attorney and Kinneman to write up a resolution, and then you said, "When you get it written up, we will pass it."

The Witness: We gave them what we had in mind, the same resolution that had been passed before that.

The Court: If it was the same one you had before, why did you have to have it written up?

The Witness: That is the argument I brought up. I don't know why. There had been some more commissioners elected, and they wanted the resolution on it.

The Court: You can't very well approve a resolution until it is placed before you.

The Witness: We knew in a general way what it was.

The Court: That is to say, you knew what the former resolutions had been, you had that spread in your minutes?

The Witness: It was supposed to be the same kind of resolution.

The Court: This same general kind of a resolution? This begins to clear up. This is the first witness I have had hold of that we can get something out of, it seems to me. Now do you recall the date in July when that occurred, when you say you were there at a meeting and it was discussed?

The Witness: It is the regular July meeting.

The Court: The regular July meeting? You hold only one meeting a month, is that it?

[fol. 377] The Witness: Well, ordinarily we do. There are special meetings. We have some special meetings that are set, for taxes, ordinarily a thing like that, that are special, and occasionally a meeting is called.

The Court: Your name is Mr. Rogers, isn't it?

The Witness: Yes, sir.

The Court: Mr. Rogers, do you recall whether you held any special meeting in July, or did you just hold your one meeting, your regular meeting?

The Witness: I don't recall a special meeting in July.

The Court: There wasn't a meeting on the 9th of July, was there?

The Witness: No, I don't think there was. This resolution, I might say, I remember signing that resolution in my home, and I don't know what date it was I signed it.

The Court: Tell us what happened on that occasion.

The Witness: It was during the month when our resolution—when I signed that resolution.

The Court: Well now, tell us who brought it out to your home, and what was said and done.

The Witness: Well, Dale Kinneman just came down there and told me he had that resolution written up and worked up. He said the other two commissioners had signed it and brought it down for me to sign, so they could take care of it. That was going ahead. I signed it.

The Court: You don't remember that date?

The Witness: I didn't pay any attention to the date. It was during the month.

The Court: All right. Go ahead, Mr. Oman.

By Mr. Oman:

Q. This previous resolution you say you had drawn up, Mr. Rogers, back in 1944, or whenever it was, related to the removal of horses from the privately owned lands there in the fields east of Monticello?

A. Yes.

Q. Now when you considered this in the year 1952, that was for picking up of the Indian horses down on public [fol. 378] domain range, wasn't it?

A. We passed a resolution in between there. There had been one passed in between to take care of horses all over

the grazing district. It wasn't Indian horses. We passed one in 1947. It was a general resolution. This one in 1952, of course there was a lot of discussion. People knew there was Indian horses on the range, but there are lots of horses on the range. Kinneman wanted to get rid of the horses, and the division of grazing wanted to get rid of the horses. They were worthless, and running there, and in order to get rid of them——

Q. Who told you they were worthless?

A. I saw the horses. There have been worthless horses on the range that I know. I saw them for the past thirty years. They live and die on the range, never broke.

The Court: Those were the horses you were trying to get after?

The Witness: Yes, those were the main ones we had in mind to talk about.

The Court: Was there any talk about Indian horses at all?

The Witness: Everyone knows some of those wild horses belong to Indians. That is, that class did. Some were branded and some were not.

The Court: Did Kinneman say anything at any time about the Indian horses that were giving them trouble down there in the vicinity concerned in this lawsuit?

The Witness: I don't recall he said anything about any particular area. It is a big area, a big country there.

The Court: I have been in it.

The Witness: Well, there have been horses all over.

By Mr. Oman:

Q. Can you explain to us, Mr. Rogers, why you considered this matter at the September 2nd meeting at all?

A. I don't know whether we considered it in the September 2nd meeting.

Q. You don't know? You didn't give your approval to it being inserted in the minutes of that meeting?

[fol. 379] A. Well, I don't know when it was. I know when we discussed it in the first place, but I don't know how it come, when it was inserted in the minutes.

Q. You don't know whether it was ever considered thereafter as to where it should be inserted?

A. No, I don't remember whether it was considered after that.

The Court: The point that is important is to find out if they passed that at any other time.

By Mr. Oman:

Q. Mr. Rogers, when you told Kinneman to go ahead and have this thing drawn up, he was then to bring it back to you people to sign and approve it?

A. For signature. As far as that is concerned with the thing, I didn't think we needed a resolution. We already had one, and I supposed what we had would carry over until another.

Q. The other commissioners wanted a resolution?

The Court: There is no use pursuing that any more.

A. The commissioners didn't care anything about it. Kinneman wanted it. These other commissioners approved of it. I didn't think it was necessary, we already had one, and it would undoubtedly carry until it was rescinded. I didn't know why we had another one.

By Mr. Oman:

Q. He was to bring it back to you?

A. He was just to write it up. I supposed it passed just the same as the other. I imagine one carried on the other. We already had one.

Q. If it were exactly like the one you had before, it would be all right with you?

A. Yes, but similar.

The Court: What I would like to know, is did you, in September, pass that resolution?

The Witness: I don't remember discussing it in September. We passed it at that time, and we already had one there, and I didn't think it was necessary to have another one.

Mr. Oman: That is all.

Redirect examination.

By Mr. Thomas:

Q. I would like to refresh your memory with respect to that, Mr. Rogers. I direct your attention to Exhibit 1 [fol. 380] in this case. Will you examine that exhibit, Mr. Rogers?

A. All of it?

Q. After examining that exhibit, Mr. Rogers, do you recall whether or not there was a commission meeting in September, the County Commissioners of San Juan County?

A. This is a minute of the September 2nd meeting, yes.

Q. Were you present at that September meeting?

A. Yes, I was there.

Q. And at that time was this resolution inserted in the minutes of the Commission?

The Court: Well, do you remember anything about it?

By Mr. Thomas:

Q. Do you remember anything about that, Mr. Rogers? Do you recall now?

A. I didn't remember the exact items of business that day, but our minutes were—whenever we met, the following month we read the minutes and pass on what is done the month before.

Q. Now that you have the exhibit, do you recall what took place?

A. Yes, I remember all these items as I read them here.

The Court: I wanted to know, he has a memory now, or does not have a memory now of that document that is inserted and dated July 9th, as to when that was done. Does that refresh your recollection at all, or is all you know about that is what you are now reading in the minutes?

The Witness: Well, I don't keep these matters in mind year after year, of course. I don't remember all these, exactly what took place there, but if the minutes were read and signed by the chairman, they were certainly approved to what took place.

Mr. Thomas: That is all.

Mr. Oman: That is all.

(Witness excused.)

The Court: We will be in recess until two o'clock.

(Thereupon a recess was taken to two o'clock, p.m. of the same day.)

[fol. 381] Afternoon Session, November 21, 1953, 2 o'clock p.m.

The Court: You may proceed.

Mr. Thomas: Call Mr. Rogers for just one question.

JOHN D. ROGERS, recalled as a witness on behalf of the defendant, having been previously duly sworn, resumed the stand and testified further as follows:

Redirect examination.

By Mr. Thomas:

Q. Mr. Rogers, I direct your attention to the year 1952, at the time that you say that you saw some horses in a corral picked up by Dee Black. Do you remember whose corral that was?

A. Yes.

Q. What corral was it?

A. It was in Ray Hunt's corral.

Q. In Ray Hunt's corral?

A. Yes.

Q. Is that located in Blanding?

A. Yes, in Blanding.

Q. Can you fix the time, to the best of your recollection, when you saw these horses, at least the month or the year?

A. It was during the month of September.

Q. Of 1952?

A. Yes, of 1952.

Mr. Thomas: That is all.

Mr. Oman: No questions.

The Court: Stay here if you want to, Mr. Rogers.

(Witness excused.)

DEE BLACK, recalled as a witness on behalf of the defendant, having been previously duly sworn, resumed the stand and testified further as follows:

Redirect examination.

By Mr. Thomas:

Q. Mr. Black, I direct your attention to the month of September, 1952, and hand you here Defendant's Exhibit A in this case. Did you put any horses in a corral which you picked up from this open range under this elimination of abandoned horses program in September, 1952?

A. Did I what?

[fol. 382] Q. Did you gather any of those horses?

A. Yes.

Q. Can you answer audibly so that you can be heard, Mr. Black? Can you speak up?

A. Yes.

Q. And what date in September did you pick those horses up?

A. 19th and 23rd.

Q. Did you pick anything up on the 25th?

A. Yes.

Q. All right. Did you pick some up on the 26th?

A. Yes.

Q. Now, did you put any of those horses in Ray Hunt's corral?

A. I did the ones I picked up on the 19th and 23rd.

Q. And do you remember Mr. Rogers coming over to the corral when those horses were in there?

A. Yes.

Q. And those were the horses which you say you picked up to which you have testified to heretofore?

A. Yes.

Q. Did you observe whether or not he examined those horses?

A. Yes.

Q. Did he?

A. Yes.

Mr. Thomas: That is all. Excuse me. I believe the Court wanted to find out from this witness the total number of cattle and sheep.

The Court: Yes. You were going to give me the records, weren't you, on that? Do you have the records? Now, some of the livestock people's names were given me. Now, there is the Redd family, for example. They have been mentioned here. Tell me how many cattle and how many sheep all the members of the Redd family graze and have permits to graze, and have permits and land. And then all these other people around this area, can you tell me that sort of thing?

The Witness: We have a list made out here.

The Court: Why don't you introduce the list in evidence?

Mr. Aho: That is merely a compilation of all the individual files in the office.

By Mr. Thomas:

Q. Explain what it is, Mr. Black.

A. It is the cattle and sheep now permitted in District 6.

Q. Were they permitted in District 6 previous to 1952?

A. Similar to this.

The Court: Why don't you introduce this as an exhibit? [fol. 383] Mr. Thomas: It would be immaterial in this case.

The Court: I don't know what would be immaterial in this case yet.

By Mr. Thomas:

Q. Are these notes on here part of the record?

The Court: Suppose you fellows go ahead with the case and examine this document, and it won't hold up these proceedings. Black doesn't know anything about it except what he read on the document.

Mr. Thomas: We are through.

Recross-examination.

By Mr. Oman.

Q. You frequently mentioned Leland Redd and Alma Redd as men who helped you in this drive, Mr. Black.

A. Yes.

Q. Did they participate with you about equally?

A. Yes, I think so.

Mr. Oman: That is all.

Mr. Thomas: That is all.

(Witness excused.)

Mr. Thomas: We offer that testimony again, if the Court please, with respect to the opinion of Mr. Rogers.

The Court: All right, it will be received.

Mr. Thomas: Would you ask Leland Redd to come in please, Dee?

The Court: I would like not only for District 6, but I want that data, the sheep carried, for Grand County as well.

Mr. Thomas: District 9.

The Court: District 9, that eastern and southeastern part of the state, south of the Green River maybe, or somewhere around in there.

Mr. Oman: 6 and 9 would take the country east of the Green River and up to the Book Cliff Mountains. East of the Green River and down.

[fol. 384] Mr. Thomas: Is that in Utah?

Mr. Oman: Yes.

Mr. Thomas: That can be done, Mr. Aho?

Mr. Aho: What does he want?

The Court: The same kind of material listed on this list.

Mr. Aho: It can't be furnished at the present time. It will have to be compiled from the records in the district office.

The Court: We will get that later the. All right.

LELAND W. REDD testified as follows:

Direct examination.

By Mr. Thomas:

Q. State your name, please.
A. Leland W. Redd.
Q. Where do you reside, Mr. Redd?
A. Blanding, Utah.

The Court: What relation are you to Charlie?
The Witness: Second cousin.

By Mr. Thomas:

Q. Mr. Redd, how long have you resided at Blanding, Utah?
A. Since 1908, with the exception of about fifteen years spent in the north part of the county.
Q. What particular place in the North part of the county?
A. At La Sal, Utah.
Q. How far is La Sal from Blanding?
A. 63 miles.
Q. Mr. Redd, how old are you?
A. I will be fifty-nine next month.
Q. Were you born in Blanding?
A. I was born just south of Blanding in Bluff, Utah, on the San Juan River.
Q. What is your occupation?
A. Sheep grower, and I have some mercantile interests.
Q. How long have you been a sheep grower?
A. Since 1936.
Q. Have you been in the general livestock business down in that area?
A. Yes, sir.
Q. For many years?
A. All my life.
[fol. 385] Q. Now, Mr. Redd, I hand you here what is marked in this case Defendant's Exhibit A, which has to do with the gathering of horses in the area known as Utah Grazing District No. 6. Are you acquainted with that grazing district?

A. Yes, sir.

Q. Are you a permittee on any part of that grazing district?

A. Yes, sir.

Q. That is, you have permits to graze stock on it, do you?

A. To graze sheep.

The Court: Let's not repeat on that matter. Aren't you going to show that by the document?

Mr. Thomas: Yes.

The Court: This is going to be cumulative then.

By Mr. Thomas:

Q. Mr. Redd, did you aid in the gathering of any horses, which is known as the program for eliminating abandoned horses?

A. Yes, sir.

Q. You answered you did. And just give the dates if you can. You may refer to that exhibit.

A. September 19th.

Q. Did you accompany Dee Black at that time?

A. Yes, sir.

Q. And how many horses were picked up?

A. Fourteen.

The Court: I think that is covered and stipulated to.

By Mr. Thomas:

Q. When else did you accompany Dee Black in the gathering of these horses?

A. On September 23rd.

Q. At any time else other than that?

A. On November 7th.

Q. Now, Mr. Redd, in your work there in that area as a livestock raiser, have you had occasion to buy and sell horses?

A. Yes.

Q. Are you acquainted with the market price of horses, or the market value of horses in that area beween September, 1952, and February, 1953?

A. Yes, sir.

Q. Did you observe the horses which were picked up on the occasions to which you have referred?

A. Yes, sir.

Q. Did you examine those horses?

A. Yes, sir.

Q. Do you have an opinion as to the market value of those horses?

A. Yes, sir.

[fol. 386] Q. What was it at the time they were picked up?

A. I would say from $5.00 to——

Mr. Oman: I object, just a moment, until a proper foundation is laid. He hasn't shown what happened to those horses.

Mr. Thomas: Of course, that is in the record, if Your Honor please.

The Court: Well, what does this man know about it?

By Mr. Thomas:

Q. You assisted Dee Black in the gathering of those horses, did you?

A. Yes, sir.

Q. And were they brought into Blanding?

A. Yes, sir.

Q. Where were they picked up?

A. The bunch on September 19th was picked up on what we call Cahoon Mesa.

Q. Is that in this disputed area?

A. Yes, sir.

Q. Federal range?

A. Yes, sir.

Q. Were all of the horses you referred to picked up on this Federal range?

A. Yes, sir.

Q. And were they all brought into Blanding?

A. Yes, sir.

Q. Now, do you have an opinion as to the market value of those horses?

A. Yes, sir.

Q. What is it?

A. I would say from $5.00 to $25.00.

Q. A head?

A. A head; yes, sir.

Q. Were those horses inferior or superior, in your opinion, to the average?

A. They were inferior.

Mr. Oman: I move that the answer be stricken, Your Honor.

The Court: Well, he has already given the value.

Mr. Thomas: He has already given a value.

By Mr. Thomas:

Q. Now, Mr. Redd, I direct your attention to a time in July of 1952. Did you have occasion to assist in the picking up of any sheep from any area near Blanding?

A. Yes, sir.

The Court: That ~~does not make~~ any difference. What difference does that make in this lawsuit?

Mr. Thomas: It goes to the question of intent, if Your Honor please.

[fol. 387] The Court: We are not concerned with Redd's intent.

Mr. Thomas: He can testify with respect to what Dee Black had to do with that.

The Court: All right. Can you fix the time when that took place? Was it in July of 1952?

The Witness: The first bunch we gathered was in the last days of June or the first days of July.

By Mr. Thomas:

Q. Was Dee Black present?

A. Dee Black was present.

Q. Can you explain to the Court how it came about that Dee Black went up there? Did you request him to go?

A. Yes, sir.

Q. Now, what was the purpose of his being there?

A. To identify these bucks that had been placed on some deeded ground of mine.

Q. Did you find the bucks?

A. Yes, sir.

Q. Were they on deeded ground?

A. Yes, sir.

Q. Or were they on Federal range, open Federal range?

A. The bucks were in charge of the sheep at this time. No one—I had this particular ground fenced, a little house, a little spring there, and they had been placed there and someone had put some brush around the gates where they might crawl out, and they were left there alone, and I didn't know whose those bucks were.

Q. What happened to those bucks?

A. They were brought into Blanding.

Q. Who brought them in?

A. I accompanied the Sheriff, the Sheriff accompanied me down there. I phoned to the Sheriff they were in trespass.

Q. Did Dee Black have anything to do with picking up those sheep?

A. No. I took Dee back down to see if he knew whose bucks they were.

Q. And did you find out?

A. Dee Black identified the bucks for us, yes.

Q. And did they belong to an Indian?

A. Yes, sir.

Q. Did that Indian recover those sheep?

A. Yes, sir.

Q. Do you remember who it was?

A. Yes, sir.

Q. Who?

A. Eddie Nocki down there.

Q. How much was paid to you for the recovery of those [fol. 388] sheep, Mr. Redd?

A. There was nothing paid to me except we got two appraisers to go down there to appraise the damage. The Sheriff got two appraisers to go down there to appraise the damage, and I believe it was somewhere around $15.00 those bucks had done me for the time they were in there.

Q. Did anybody pay you $480.00 for the procuring back of sheep you picked up, Mr. Redd?

A. The County——

The Court: I would like to know what that has to do with this lawsuit?

Mr. Thomas: It has to do——

The Court: Who cares what he has been paid for sheep and what he hasn't been paid for sheep?

Mr. Thomas: I just want to identify them.

The Court: We have a roomful of unfortunate people here, and there is a snowstorm on, and I want to get this thing wound up and get them on their way home so they can go back to where they can be comfortable and where they can be taken care of, and I am not going to monkey around here all afternoon having you repeat stuff and talking about matters that don't have any concern with this lawsuit.

Mr. Thomas: That is all.

Cross-examination.

By Mr. Oman:

Q. You called Mr. Black to identify these bucks?

A. Yes, sir.

Q. Why did you call him?

A. Because I thought he knew the trespassing sheep in that area.

Q. You considered that he knew all the livestock in that area, didn't you, Mr. Redd?

A. Not necessarily all the livestock, and I had an idea that he might identify those bucks.

Q. He identified the other sheep that were involved for you, other than these bucks?

A. Yes.

Q. He identified those. Those also belonged to Indians, did they not?

A. That is right.

Q. Mr. Redd, did you ever write the Secretary of Interior [fol. 389] a letter urging him to do something to rid this country of Indian use?

A. Yes, sir.

Q. You urged him to bring legal action to rid the Indians from this area with which we were concerned here?

A. I asked him to use his good offices to help support the laws of the land in that area.

Q. Didn't you urge him to see that litigation was brought to rid this country of Indian use?

A. I don't recall whether litigation or not, but they were on our backs and trespassing in this area, contrary to the laws of the United States, and I asked him for help. And I received a letter back from him too, and he urged the Indians to leave the area until the thing could be brought out in court.

Q. What you mean by being brought out in court, are you referring to the action here in this court a number of years ago?

A. I referred to any help I could get to help out on this trouble.

Q. You considered the Indians trespassing on you, even though they were on Federal range?

A. They were on my private land.

Q. What about Federal range? Didn't you consider they were trespassing on you?

A. I had paid a lot of good money every year for grazing on areas, and somebody else was getting a good part of the grazing.

Q. You mean you paid the money to the Bureau of Land Management for the Federal range fee?

A. That is right, and somebody was grazing from year to year.

Q. While this lawsuit was pending about which you have said something, do you refer to the lawsuit brought by the Government to restrain these Indians from using this area?

A. I don't recall just what they did say in that regard.

Q. I am not talking about the letter, but you knew about that lawsuit, did you not?

A. I knew the Bureau of Grazing was trying to get men to get these sheep off the range.

Q. While that case was being considered, didn't you bring an action, along with other white people, permittees, against the Indians in the State Court?

A. The first suit was not against those particular ones that were involved in this Federal suit, but ones that as of the case was not included. Mind you, when the invasion [fol. 390] started down there, they just came across the river with several thousand sheep, and they were not all involved in this Federal suit at that time.

Q. No, but you people brought an action in your indi-

vidual names against these Indians, including all of these plaintiffs together, and money damage from them for grazing this Federal range, and also to get a restraining order, to restrain them from using this Federal range, is that right?

A. Oh, yes, we were taking all means legally that we could to help us out of this bad situation.

Q. Including killing their horses?

A. Not including killing their horses.

Q. Well, you say you accompanied the gathering of these horses on several occasions.

A. We didn't kill any when I helped gather them.

Q. You didn't kill any?

A. No, sir.

Q. You knew what was going to happen though.

A. I knew the County had issued the notices these horses were going to be gathered, these abandoned horses were going to be gathered.

The Court: Your purpose in helping then was to get the Indians out of the area?

The Witness: Not the Indians, but the sheep and the livestock.

The Court: The livestock?

The Witness: Yes, sir.

The Court: The Indians' livestock?

The Witness: The Indians' livestock, as well as any body else's trespassing in that area.

By Mr. Oman:

Q. Was anybody else trespassing?

A. Occasionally there would be some horses show up of other people's.

Q. That would be a very rare thing?

A. Oh, no. I think you know about several hundred that was killed down in the Price area.

Q. I mean in your country, about which we are talking in this lawsuit.

A. No, sir; there were lots of other horses in different areas of Grazing District 6 gathered up.

[fol. 391] Q. In this round-up in 1952?

A. Not in that particular one there wasn't very many.

Q. That was years before, wasn't it?

A. I wouldn't say years before, but awhile before.

Q. How long ago, would you say?

A. There was a horse round-up advertised in '50 and '47 and various times. They tried to keep the range, as you know—you have been a grazier's aid—and you know it was your duty to round-up the horses off the range and protect the range.

The Court: This particular round-up was to round up these Indians' horses in this vicinity?

The Witness: It was to round up any horses in that area at that time of the year, because there was no horses licensed in that area that time of the year.

The Court: You live in Blanding?

The Witness: Yes, sir.

The Court: Well, how far is it from Blanding out to where these seven or eight Indian families live in Montezuma Creek?

The Witness: It is about twenty or twenty-five miles.

The Court: How long have you lived there?

The Witness: I have lived in Blanding since 1908, with the exception of about fifteen years.

The Court: How long have you known these seven or eight Indian families to live there where they were living, until you ran them out of the country last year?

The Witness: We didn't run them out of the country.

The Court: They are not there any more. What do you think happens to an Indian when you *cease* his livestock and you won't let him have livestock?

The Witness: These particular Indians went back into the reservation where their homes are.

The Court: That isn't the evidence in this case. That isn't where their homes were. Go ahead, Mr. Oman.

[fol. 392] By Mr. Oman:

Q. Mr. Redd, you pursued this lawsuit you brought in the State Court, and you did secure an injunction against these Indians, didn't you?

A. That was right.

Q. You are one of the plaintiffs in that lawsuit?

The Court: Just a Minute, what is so humorous, Black, about this case?

Mr. Dee Black: I am sorry, your Honor.

The Court: You leave the courtroom.

(Mr. Black thereupon left the courtroom.)

The Court: Now there is a fellow that was involved as much or more than anybody else. Now he is getting a lot of humor laughing about the testimony in this case. We have seen here a total disregard, it seems to me, of the rights of people. I don't know what kind of people you are down there in that community, from what I have seen in this courtroom. Go ahead.

By Mr. Oman:

Q. Your restraining order included restraining the Indians themselves from coming on this land, didn't it, Mr. Redd?

A. I am not an attorney, Mr. Oman. I don't understand the legal words that were in there. We got some very reliable attorneys, we thought, and we turned the legal end of it over to them. I am not acquainted with those legal terms.

Q. Did the Advisory Board assist you in this legal action that you have brought against these Indians in the State Court, did you pay your attorneys' fees?

A. No, sir. No, sir.

Q. Did they pay any of your costs?

A. To my knowldge no, not in that action.

Q. Did they in any of these other actions?

A. I don't know.

Q. You say that horses were gathered throughout the District in this drive in 1950, Mr. Redd?

A. Yes, sir.

Q. Now, Monticello sits almost near the center of the District, doesn't it?

A. If I understand the north end of the boundary, yes.

Q. Can you tell us then how many were gathered in the northeast part of the District, that part east of the road

[fol. 393] which leads to Moab, north of the road which leads from Monticello to Colorado? Any horses gathered in that area?

A. To my knowledge there wasn't, because I have been through that country and never saw a stray horse.

Q. No, there weren't any horses there, and that is a big segment of this whole District, isn't it, at least one-fourth of it?

A. Well, you know what the District covers.

Q. I am asking you. You answer the questions, Mr. Redd.

A. Yes, sir.

Q. Now, let's consider the part west of the Moab road, the road between Moab and Monticello and a line running due west from Monticello to the west line of the district. Any horses gathered in that segment of the district?

A. I was down there one time when there was a lot of horses gathered in that district.

Q. The 1952 round-up?

A. As far as I know there was none gathered.

Q. Let's take the southwest corner of the district. Were there any horses gathered there?

A. Yes, there were some.

Q. How many?

A. I don't know. I know they brought in one bunch out in that area.

Q. Is that the bunch that would have been brought from Clay Hills?

A. That is in the southwest part of that district.

Q. Not too far from Blanding?

A. Clay Hills, I would say, is forty or fifty miles, fifty-five out there.

Q. Then we come down to this disputed area. About what part of the district is this, maybe 1/10th or 1/20th of that District No. 6?

A. Well, some of those Navajos have been claiming for everything in that district, the aboriginal rights.

The Court: We are not interested. That will be stricken.

By Mr. Oman:

Q. You are acquainted with the area in dispute?

A. Yes, sir.

Q. That area is approximately what part of the total land area in Grazing District No. 6?

A. I don't know where the north end is, north of Moab in there, but if it extends to the Book Mountain, that I think it does——

Q. The District does not extend to the north of the moun- [fol. 394] tains. That is 9.

A. I beg your pardon. If it is San Juan County, then this area goes up to Monticello and out to the natural bridges, out in there. I would say it covers maybe one-fourth or one-third of the whole district. From Monticello south I am speaking.

Q. That isn't the area in dispute. Monticello south covers thousands and thousands of acres of grazing land. I mean the area under the reef.

A. I beg your pardon. When Knox Patterson was trying this, I lived in that area up there.

Q. Knox Patterson isn't trying this case. Isn't it a fact that this little disputed area certainly isn't more than 1/10, probably 1/20 of the district?

A. I would say that is wrong.

Q. What would you say is right?

A. I would say maybe one-fourth to one-third of it.

Q. You are very well acquainted with it, and we will bring in some information to show what it is.

A. I am speaking from Monticello south, the area that was claimed.

The Court: Now you have made that claim. He hasn't talked about what Knox Patterson claimed.

By Mr. Oman:

Q. Those Indians have been there all of your life, haven't they, Mr. Redd?

A. No, sir.

The Court: Well, you see he is sliding out on you because you said "those Indians".

By Mr. Oman:

Q. Do you know the plaintiffs?

The Court: Take them one at a time. You have to fasten these fellows down. We have learned that in the last five days. Take a small segment and back them into a corner, and then they will come out with it sometimes. Some of them haven't come out with it.

By Mr. Oman:

Q. Do you know the plaintiffs?

A. I know some of these plaintiffs. I never met them all.

The Court: Take them one at a time. There are only seven or eight of them.

By Mr. Oman:

Q. Do you know Eddie Nocki?

A. Yes, sir.

Q. Do you know where his hogans are located east of [fol. 395] Blanding in this disputed area?

A. I know where his hagon is in the reservation, yes, sir.

Q. I am asking you about the disputed area.

A. Eddie Nocki built a hogan about '50 out on the public domain I am acquainted with.

Q. What about a hogan that was built before that?

A. He had one down near the river that they told me was his. I never saw him there.

Q. You have seen hogans, have you, owned by Sakezzie in this area?

A. Yes, sir. He has one about a half a mile outside of the reservation fence, and he has one in the reservation fence.

Q. Are you acquainted with the hogans up in Cross Canyon?

A. There has been some hogans built up there recently and I have seen them.

Q. Do you know the hogan of Caroline Rift, some five or six miles back of Montezuma Creek, some five or six miles west of the reservation boundary?

A. No, I have never seen that one.

The Court: He doesn't know about that one. If he does he isn't going to tell you.

By Mr. Oman:

Q. You say you never shot any of these horses yourself, Mr. Redd?

A. No, sir.

Q. Were you furnished ammunition to shoot them when you saw them?

A. No, sir.

Q. I beg your pardon?

A. No, sir.

Mr. Oman: I believe that is all:

Mr. Thomas: That is all, Mr. Redd.

(Witness excused.)

Mr. Thomas: Now, if your Honor please, in examining this answer of the defendants, I find that there are two provisions of the 1943 Utah Code Annotated that should be called to the attention of the Court and possibly placed in the record. I wonder if I might read that, these provisions.

The Court: You mean these are in the Code?

Mr. Thomas: They are in the State law, not in the Federal Code.

[fol. 396] The Court: This Court takes judicial knowledge of the laws of Utah. You don't need to read that into the record.

Mr. Thomas: All right. We call attention to the provisions of Title 64-2-6, Utah Code Annotated, 1943, which is the same as provisions of Title 47-2-6, Utah Code Annotated, 1953, and also to the——

The Court: Wait a minute, is your evidence closed?

Mr. Thomas: No. We have no further testimony.

The Court: Do you have any rebuttal?

Mr. Oman: I spoke to Mr. Kinneman to have ready the documents he produced here yesterday. I would like to have him give the reports back here to the Regional Office on what he had accomplished in gathering the Indian horses and having them destroyed.

The Court: What we want is the correspondence?

Mr. Oman: Back and forth.

The Court: Yes, I want the correspondence between Kinneman and the Regional Office about this whole matter.

Mr. Aho: The request wasn't made to me. I don't know anything about it.

The Court: We will take a brief recess while you fellows get that for me. I want the whole record of correspondence between this Regional Office and Kinneman back and forth about this whole matter, before and afterwards. There is a good deal of difficulty getting anything out of these witnesses, and I am not sure why.

(Thereupon a recess was taken after which the following proceedings were had:)

Mr. Oman: If the Court please, we have found the documents about which the discussion was had just before we adjourned, recessed, and we are ready to stipulate as to the information contained in that file, and also as to the total use made in the Districts 6 and in 9, and we will also show the total use in District 6 and that use which is within the disputed area.

[fol. 397] The Court: Let's introduce the documents.

Mr. Oman: Couldn't we stipulate to it and save a little time?

The Court: I don't think you save any time. Just offer the documents.

(The documents referred to were marked, Plaintiffs' Exhibits 8, 9 and 10, respectively, for identification.)

Mr. Oman: We offer then, your Honor. Plaintiffs' Exhibits 8, 9 and 10.

The Court: Now, what are those?

Mr. Oman: 8 is a file contaning all of the correspondence between the Bureau of Land Management office at Monticello, Utah, and the Regional Office at Salt Lake City, relating to the abandoned horse program.

The Court: Now, have you examined the documents in that file?

Mr. Oman: I have examined them just briefly during the recess.

The Court: Do they have any bearing on this lawsuit?

Mr. Oman: I believe some of them do.

Mr. Thomas: Most of them do not, Mr. Oman.

Mr. Oman: I think a good part of them don't. They are subpoenas and copies of what we have already introduced in the way of your publication notice and the notice which was posted.

The Court: You claim something for some of the documents?

Mr. Oman: Yes, we do.

The Court: All right, we will receive the file, and when we are through with it it will be returned to your office.

Mr. Thomas: That is Exhibit 8.

(The document previously marked, Plaintiffs' Exhibit No. 8, for identification, was received in evidence.)

[fol. 398] The Court: And those matters we want copies of, copies will be provided, and we will substitute copies for the originals and let you withdraw them, the exhibit.

Mr. Thomas: It is agreeable.

The Court: The others are the use summaries?

Mr. Oman: Yes.

The Court: We will receive those exhibits also. Just put them in the record.

(The documents previously marked, Plaintiffs' Exhibits Nos. 9 and 10, for identification, were received in evidence.)

Mr. Oman: If we can stipulate on sheep and cattle in District No. 6, 14,266 cattle, 55,468 sheep and 68 horses, and within the area in dispute, 3,899 cattle and 33,818 sheep are under permit from the Bureau of Land Management to white livestock operators.

The Court: Well, will you stipulate to that, Mr. Thomas?

Mr. Thomas: Yes, your Honor.

The Court: All right. Is this correspondence file you have the Regional Office file or the Monticello correspondence file?

Mr. Thomas: The Monticello office correspondence file, I understand.

The Court: Where is the Regional Office correspondence file? You have two offices corresponding with each other. I want both of them.

Mr. Thomas: The office is closed today.

The Court: We are working here on Saturday.

Mr. Aho: We will have to get somebody from the Range Management Division from their home to come here and locate the file.

Mr. Thomas: Could we furnish that later?

The Court: Well, let's get it. Get in touch with them and get them down here this afternoon. Let's get that done without delay. I am surprised you fellows didn't have that here. I am surprised you didn't have it in here. Go head.

[fol. 399] Mr. Thomas: We rest.

Mr. Oman: I would like to call Ira Hatch for just a few questions, if I may, your Honor.

The Court: Put him on.

IRA HATCH, called as a witness in rebuttal by the plaintiffs, testified further as follows:

Direct examination.

By Mr. Oman:

Q. Mr. Hatch, you have been previously sworn in this matter?

A. Yes, sir.

Q. I ask you——

The Court: Before you go on with this now, I will want the custodian of the Regional file to bring those files in here and take the stand and let me ask him a couple of questions about it. When they take the file out, I don't want them to leave. I want them to come in here so I can ask them some questions.

By Mr. Oman:

Q. Mr. Hatch, do you freight in and out from Montezuma Creek?

A. Yes, sir.

Q. Various articles, including hay?

A. Yes, sir.

Q. Are you acquainted with what it will cost to haul hay to that area from the closest hay that is available?

A. In the neighborhood of $10.00 a ton.

Q. Now, Mr. Hatch, you, in 1952, were in the business of buying and selling sheep and cattle in Montezuma Creek?

A. Yes, sir.

Q. And from these plaintiffs?

A. Yes, sir.

Q. And what were cows and what were sheep selling for in that area at that time?

A. From $30.00 to $35.00 for a good type ewe.

Q. And what were cows?

A. In the neighborhood of $200.00.

Q. Per head?

A. Per head.

Q. Ira, you have ridden this range for the last nearly thirty years, is that true?

A. That is true.

Q. Been engaged in the livestock business yourself all of that time?

A. Yes, sir.

Q. You have been engaged in that business all of your life here and elsewhere?

A. That is right.

[fol. 400] Q. Will you tell the Court what is the common knowledge of stockmen using the same range area, whether they know each other's livestock?

A. Well, to a certain extent. Each stockman knows what type of stock the other stockman is running, but he couldn't swear to the number or anything like that.

Q. No, but you know each other's livestock, your brands and types of livestock?

A. Yes, sir.

Q. Is that true in every area you ever operated in?

A. Yes, sir.

Mr. Oman: That is all.

Mr. Thomas: No cross-examination.

(Witness excused.)

The Court: You also rest?
Mr. Oman: We rest, your Honor.
The Court: What is your position, Mr. Thomas?

(Arguments of counsel.)

The Court: Have you anything further?
Mr. Oman: As to the law, I am prepared to go ahead.

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The Court: No, there isn't any point in doing that. The judgment in this case will be for the plaintiffs. Now, let me see the prayer of your complaint. In your complaint you ask that damages be awarded against the defendant in the sum of $100,000.00. Damages are awarded against the defendant in the sum of $100,000.00 in this case.

Now, with respect to that, I doubt the testimony of several witnesses here with respect to the value of their own horses, and moreover, I accept the testimony of several witnesses here with respect to the consequential damage that flowed from the wrong involved in destroying these horses. There is elaborate testimony about the consequential damages to these individuals.

Now, as far as the tort liability is concerned, there could be no question about that. I think the State statute has no [fol. 401] application since the Taylor Grazing Act is concerned, but even if the State statute does have application, assume that it does have application, the employees of the Bureau of Land Management did not follow the State statute. Moreover, the employees of the Bureau of Land Management did not follow the very section of the Code of Federal Regulations to which they refer me in this case. That is Section 161.11, Subdivisions (a) and (b).

Section 161.11 contemplates a written notice to the owner of the livestock with an opportunity to protect himself.

Now, that Section 161.11, together with the abandoned horse program in the provisions of the Utah statute to which you refer are summary proceedings. They are harsh and they are drastic. Those sections contemplate that official action be taken without an opportunity to hold a hearing and to have the matter judicially determined. Now, the law about that kind of a proceeding is that you have to follow the statute or the regulation strictly. As I said a bit ago,

you have got to cross the t's and dot the i's. If you don't with exactness follow the letter of the statute or the regulation your action is void, without validity, illegal.

Now, the reason for that is plain. There would be no protection against the most arbitrary, capricious, or whimsical conduct on the part of some bureaucrat unless that were the law. In the ordinary case the protection against arbitrary and capricious action is the judiciary. When the legislature provides that an official may take summary action, the legislature surrounds that provision with safeguards, spelled out in the legislation, and I observe it is spelled out in Paragraph 161.11. That is to say the legislature permits that summary action to be taken only when surrounded by the safeguards spelled out.

Now, you can't play fast and loose with those things. You must follow that statute and you must follow that regulation with particularity. Now, Section 161.11 required written notice, not tacked up on some sagebrush bush out in the wilderness or some old fence post or dead tree. That paragraph requires written notice to the owner. That is what it requires. Well, you didn't give them any.

Now there is only a pretension of an excuse for that here in my judgment, when these fellows say they didn't know [fol. 402] they were running off Indian horses. I just don't believe it. And I observed their conduct on the witness stand. They were evasive. I observed their extreme reluctance to testify. I observed in the case of Kinneman that after awhile he contradicted himself. I observed in the case of Dee Black that finally he said he thought he had a notion as to who owned the horses. He thought they belonged to the Indians all right.

That is the fellow that sat up on the bluff until Sakezzie's horses were turned out from the corral in the dark of the night and went down and caught them. I am going to make a finding on that because I believe he did.

Now, you didn't follow your own regulation, 161.11, but that is only part of it. Assume that the Utah abandoned horse statute summary proceeding might be applied in a case like this. You didn't follow that with particularity, and for more than one reason. In the first place I don't believe the Board of County Commissioners of San Juan County ever did have a duly called official meeting and adopt

this resolution. I don't just think they adopted a resolution, and I will tell you what I think they did, and Mr. Rogers told us the story about that. I think in the meeting of July 1st Kinneman came in and talked to them about that and said he would like to have a resolution. Rogers said, "You don't need any resolution. We have got the resolutions here in the minutes on other occasions, never rescinded, that apply."

Kinneman wasn't satisfied with that, so what the Commissioners told him was, "You and the County Attorney frame one up, and we will pass it." And they sent him out to do it.

Then what Kinneman does, he gets this resolution, which is Exhibit 1, and he, Kinneman, an employee of the Bureau of Land Management, carries that around to the farms and around to the three County Commissioners to get them to sign it. They are not at one place but different places. Crowley said he signed it in his home.

Now, that isn't an official action of the Board of County Commissioners when they signed that thing out there. It wasn't done in the duly regularly called meeting of the County Commissioners. That isn't a resolution of the [fol. 403] Board of County Commissioners. This is something they are doing for Dale Kinneman who hasn't any official connection with the Board of County Commissioners.

And then again with respect to that, on September 2nd, which was a regular meeting of the Board, the only action the Board took was to say, "Let's insert this regulation in the minutes." They did not then and there adopt it. There is nothing at all to that effect in the evidence.

They just voted then to insert it in the minutes, so I don't believe you ever did get a duly adopted resolution. Now, I think that the suggestion that has been made here, that they adopted the resolution at the time they said to Kinneman to go on and draw one up, I do not believe that that was an adoption of the resolution, because the Board of County Commissioners can't delegate its functions to Mr. Kinneman who is an employee of the Bureau of Land Management and hasn't any official connection with them. They can't delegate the job of drafting the resolution, stating what is in it They can't say, "Why, we here and now adopt any language that you see fit to put in a resolution over there that is similar to some action that we have taken

heretofore in the past." They can't delegate that to somebody else. So I don't believe there was an adoption of a resolution when they said, "All right, if you want one, go out and drawn it up and we will adopt it."

I think what is the fair interpretation of the whole thing is that the idea was for him to bring it back to the meeting, this one or another, and that then they would pass it.

Of course, that is the only legal way they could act. They certainly could not delegate to Dale Kinneman, or anybody else, their authority to adopt a resolution, put what language he wants in there and draw it up to suit himself.

At any rate there are no presumptions of legality when it comes to the abandoned horse statute in this State, because that statute provides for harsh and drastic summary action. Every one of the requirements must be followed with particularity. The only thing that satisfies the statute is strict compliance.

Well, that isn't all that is the trouble here. There is some[fol. 404] thing else, and that is notice. Now, there are three kinds of service that we run across in a great variety of different places in the law. One is actual notice; another one is substituted service, or substitute notice; and the third is constructive notice or service. Take, for example, the issue of a summons issued out of this Court. The usual way to serve it is for the Marshal to serve it personally upon the defendant, and the Marshal recites in his return of service that he served it at a certain time and place on the man personally. Well, that is personal service, and personal service is required every time you can get personal service.

Now, substitute service is service upon a person by leaving a copy of the summons at his usual place of abode with some suitable person over the age of fourteen years in this State. You can use that service only when he isn't there, only when you can't serve him personally.

Constructive service goes further. You can serve him by publication in a newspaper in the right kind of a proceeding if the statute provides, but you can use that service only if you can't serve them actually and personally, and if you know—even if you are using constructive service under the statute—if you know where the fellow is you have got to give him actual service. Now, I think that that is the law about notices.

You are about to take Sakezzie's horses, or if you are going to take the horses of these seven or eight little families, you know they are Indian horses, you are going to take those, you can't just fix up five notices, or seven notices or eight notices and tack them up around on the range somewhere and after awhile come around and kill their horses. If you know or have a pretty good idea, or as Dee Black said, thought they were the Indians' horses, it is your duty to give them actual notice. That is what these things mean. Now, they didn't do that.

As a matter of fact, your own regulation, 161.11 requires an actual written notice. Well, not only was this statute and this regulation not followed with exactitude and particularity, there is very little attempt to follow it. This is a wrongful taking and destruction of these people's livestock.

[fol. 405] You will observe now, Mr. Interpreter, and I want you to pay some particular attention to this and follow it closely, that I haven't said anything about who owns the land down there. That isn't important in this lawsuit. These plaintiffs are entitled to recover these damages for the destruction of their personal property, namely their livestock, whether they owned that land or whether they didn't own that land. So I am not deciding that question now, do you see? I don't want to have any misapprehension about that. In this lawsuit at this point I have not made any decision about who owns land down there. You understand that, Mr. Interpreter?

The Interpreter: That is right, your Honor.

The Court: I want you to tell these people about that. That is going to have to be decided in the future. I don't want these people to get the idea now that I have held that they owned that land, because that isn't involved here. That question I don't have to decide in this proceeding.

Now, I am making some inquiry about that with a view to getting the testimony perpetuated here, and I am going to take some action about that. As a matter of fact, there are several courses that I am going to take.

In the first place, as a part of the judgment in this case, I am going to enjoin the Bureau of Land Management, the United States, I am going to enjoin all of the employees of

the Bureau of Land Management and all of their offices, agents, employees, associates, anybody else through whom they might act, I am going to enjoin them from any further depredation and disturbance of these Indians' livestock down there.

Now, that injunction is a temporary injunction to continue while this Court investigates the situation in that area, and while this Court perpetuates some testimony, and the powers of a chancellor are broad enough, I think, for this Court to call in the Indian service and find out what the problems are, call in the Bureau of Land Management folks and find out what their problems are, and we are going to make an inquiry, and pending that inquiry the Court is going to temporarily enjoin any interference down there.

[fol. 406] Now again, I don't want anybody to think that on the reservation that now they may drive all their sheep, thirty or forty thousand, or any other number of sheep, back into this area. We are not talking about that yet. Mr. Foreman, you understand?

The Interpreter: That is right.

The Court: All we are deciding in this lawsuit is that these people's livestock have been taken wrongfully and they are entitled to be compensated for it.

I think these folks have acted with great restraint down there, and I want them to continue to act that way. I don't want the Government people or the livestock people to be bothering them, and I don't want them to be bothering the other folks about that land title, or about anything else.

I am coming down, Mr. Thomas and Mr. Oman and our staff and the reporter will come down there, and we will take some testimony from their own people who couldn't come up here, and then I am going to ask you gentlemen on both sides to make some inquiries and studies about this thing, and I am going to look into it.

Now, when I find out what the situation is, I am going to address communications to the President of the United States, and I am going to take other action of that sort with a view to getting a solution to this problem in an intelligent way if we can. You see, the President is the superior of both of these agencies, and I think if approached properly we could find a solution for this.

Now, I frankly confess that I am not familiar enough

with the problems of that reservation or with the problems of the range to know the answers yet, but before we get through we are going to find some answers, and in the meantime depredations of the kind that have been committed here are enjoined.

Mr. Aho: May I address a question to the Court?

The Court: Yes, indeed.

Mr. Aho: I have been advised there have been several applications for homestead entries filed in this disputed [fol. 407] area. Will the restraint upon the Bureau be broad enough to withhold any action on those applications also?

The Court: You are going to get into more trouble, aren't you? As soon as these homesteaders get in there, they are moving in upon those folks who have been there. I think the evidence shows now they have been there three or four generations in this very place.

Mr. Aho: The Regional Administrator brought this matter to my attention, and he wanted to be sure the Bureau is right.

The Court: Don't you think that is a matter you folks ought to talk to me about? How about you and Mr. Oman coming in, and Mr. Thomas, and let's see what your problem is about that now. We don't want to interfere in any way that does not concern this situation, this disturbed situation.

I have a general idea about what the problem is. This is the fringe of the reservation, and there is some drifting. I will bet you there is drifting both ways, and drifting of livestock from off the reservation, on the one hand, and drifting of livestock onto the reservation, on the other hand, and there are problems with folks who have never gone on the reservation, never been on the reservation. I think the evidence is clear about that.

These people don't lie, and I am just as sure of that as that I wouldn't lie about this matter myself. These people don't lie. These peole didn't lie in this Court. There are difficulties of language, but we surmounted those difficulties of language. I think we got the truth.

Now, there is a problem to be solved down there. It can't be solved by fighting about it, and we are going to try to help solve this thing without fighting about it, and while we

are trying to solve it, I don't want any more disturbances. That is all that injunction means.

Now, Mr. Oman, and Mr. Thomas, will you come up here? I don't think I have to enjoin the Indian people.

Now, there is one other thing at this point. We have some records here, and I am going to take a short recess while the attorneys look at the records, and then I will see whether we receive them in the record or not.

[fol. 408] There is one other thing. Under this Tort Claims Act, the Congress of the United States provides that the attorney is to be paid out of the judgment. Now, Mr. Oman has not put in any bill about this at all, but it is my duty, as the Judge of the Court, to fix that fee. You understand that, Mr. Foreman? It is one of the things the Act of Congress says I must do. I must fix the fee for the attorney. Now, I have got to do that.

The statute says that I may fix that fee at anything up to twenty percent of the total judgment. Now, I fix that fee at fifteen percent of the total judgment. Now, I will tell you something about that. This case isn't over with now, I suppose. Ordinarily in cases like this they appeal to a higher court. You understand, Mr. Foreman?

The Interpreter: That is correct.

The Court: This attorney is going to have to take care of all the legal work to the Court of Appeals for the Tenth Circuit, and he has to take care of all of the legal work to the Supreme Court of the United States if it goes there, and if it is sent back here for retrial he has to take care of trying it all over again. So I think he is entitled to fifteen percent of the recovery in this case.

Is that satisfactory, Mr. Oman?

Mr. Oman: Yes. Thank you, Your Honor.

The Court: Now the Court will take a ten-minute recess or as long as may be necessary to enable you folks to look at the records and see whether we want to receive them.

Mr. Oman: Warren Gray, please take the stand. Will you mark these?

(The documents referred to were marked Plaintiffs' Exhibits 11, 12, 13, and 14, respectively, for identification.)

WARREN J. GRAY testified as follows:

Direct examination.

By Mr. Oman:

Q. I hand you Plaintiffs' Exhibits 11 to 14, inclusive. Will you state your name, please, Mr. Gray?

A. Warren J. Gray.

[fol. 409-412] Q. Are you employed by the Bureau of Land Management?

A. Yes, sir.

Q. In what capacity?

A. Range Manager.

Q. In the Regional Office?

A. Yes, sir; as assistant to Mr. Newman.

Q. Kelso P. Newman?

A. Yes, sir.

Q. In that capacity do you have charge of the files of the general office?

A. In a general way, yes.

Q. Have you secured files relating to abandoned horses, and particularly to Navajo livestock in Grazing District No. 6?

A. Yes, sir.

Q. And will you tell us whether the exhibits you hold in your hand are those files?

A. The exhibits are the files in the Regional Office of the Division of Range Management concerning correspondence and files on the Navajo Indian use in Utah Grazing District No. 6 from the inauguration of the district to the present date.

Mr. Oman: We offer them, Your Honor.

The Court: Well, you have no objection?

Mr. Thomas: No objection.

The Court: All right, they may be received.

(The documents referred to, previously marked Plaintiffs' Exhibits 11, 12, 13 and 14, respectively, for identification, were received in evidence.)

The Court: They are received with the understanding you gentlemen examine them and indicate to the Court what

you need here, and we will substitute copies for those things left in the record, and the whole thing may be withdrawn, returning the files to the Bureau when you are through with them. I want to take a look at the material before it is returned.

Mr. Oman: That is all, Mr. Gray.

(Witness excused.)

[fol. 413] IN THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

[Title omitted]

APPELLANT'S STATEMENT OF POINTS ON APPEAL—Filed August 3, 1954

The United States of America, appellant in the above-entitled case, respectfully states the points upon which it intends to rely on appeal, as follows:

1. The district court erred in refusing to dissolve the restraining order against the United States and its agents and employees by its order of June 25, 1954, on appellant's motion to dissolve the restraining order.

2. The district court erred in continuing the restraining order against the United States and its agents and employees by its order of June 25, 1954, on appellant's motion to dissolve the restraining order.

3. The district court erred in setting over indefinitely appellant's motion to dissolve the restraining order for a hearing on sworn testimony and documentary evidence, because the purely legal ground of want of jurisdiction alone required immediate dissolution without testimony or evidence.

[fol. 414] 4. The district court erred in setting over indefinitely appellant's motion to dissolve the restraining order for a hearing on sworn testimony and documentary evidence, because the statements of facts as to irreparable injury in the affidavit supporting the motion were not con-

troverted by evidence or affidavit by appellees who never even sought a restraining order.

Dated at Washington, D. C., July 21, 1954.

United States of America, Appellant, By: Perry W. Morton, Assistant Attorney General, Roger P. Marquis, S. Billingsley Hill, Attorneys, Department of Justice, Washington, D. C.

Filed Aug. 3, 1954.

[fol. 415] IN THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF UTAH CENTRAL DIVISION

[Title omitted]

MOTION TO DISSOLVE JUDGMENT AND RESTRAINING ORDER—Filed June 15, 1944

Comes now defendant, The United States of America, and moves this Court to dissolve that certain Judgment and Restraining Order filed January 18, 1954 in the above-entitled cause, by which this Court enjoined and restrained the defendant, The United States of America, its officers, agents and employees from harassing or molesting the plaintiffs or their families in the possession and use of certain public lands in southeastern Utah and from taking any further action under the applicable laws and regu-
[fol. 416] lations to dispose of any of said public lands or any interests therein until such time as the Court otherwise ordered. Upon motion of the defendant on May 10, 1954, this Court modified the said Judgment and Restraining Order to permit the Atomic Energy Commission to lawfully and properly carry on exploration, mining and leasing activities pursuant to the authorization and direction of the Atomic Energy Act of 1946, as amended.

The reasons for this motion are as follows:

1. This Court is without jurisdiction to enter the said Judgment and Restraining Order enjoining and restraining the United States of America in the absence of the consent to do so by Congress.

2. The continuance in force of the injunction and restraining order has resulted and will result in irreparable injury to the defendant in the administration of its lands and to citizens of the United States who have legal rights or interests in the public lands in question pursuant to the laws and regulations of the United States as more specifically set out in the affidavit filed herewith.

3. No provision has been made to indemnify the United States against the damages which will ensue as a consequence of the injunction and its remaining in force, and the damages are of such a character and extent that they cannot be adequately indemnified by surety bond.

4. The irreparable injury and damage to the defendant far outweighs any conceivable advantage that could inure to the plaintiffs as a result of the continuance in force of said injunction and restraining order.

5. The United States Indian Claims Commission has exclusive jurisdiction of any claim which the plaintiffs may have based upon aboriginal occupancy, and there are now pending before the said Commission cases numbered 69 and 229 involving claims of the Navajo Indians to the lands involved in this action.

In support of this motion there are presented herewith the following:

[fol. 417] (a) Affidavit of H. Byron Mock, Area Administrator, Bureau of Land Management, United States Department of the Interior;

(b) Photostatic copy of petition of Navajo Tribe of Indians vs. The United States of America before the Indian Claims Commission, No. 69; and

(c) Photostatic copy of petition of Navajo Tribe of Indians vs. The United States of America before the Indian Claims Commission, No. 229.

Dated this 15th day of June, 1954.

A. Pratt Kesler, United States Attorney, Llewellyn O. Thomas, Ass't. United States Attorney, Attorneys for Defendant.

Filed with attachments and proof of service June 15, 1954.

AFFIDAVIT

STATE OF UTAH,
County of Salt Lake, ss:

H. Byron Mock, being first duly sworn, on oath deposes and says:

That he is employed by the United States of America as Area Administrator, Bureau of Land Management, Department of the Interior, of Area 2, comprised of the States of Utah, Idaho, Nevada, and Arizona.

That, as Area Administrator, he has supervision and administration over the public lands in Utah, and, more particularly, the public lands embraced in the area described in plaintiffs' complaint.

That, as Area Administrator, he is responsible for the administration, use, lease or disposal of the public lands under the applicable public land laws in the area described in plaintiffs' complaint.

That, as Area Administrator, he states the following facts which are relevant to the "Motion to Dissolve Judgment [fol. 418] and Restraining Order" filed by the defendant in the above-entitled action:

1. The total acreage of the land embraced in the area described in plaintiffs' complaint approximates 767,000 acres. Of this total acreage, approximately 656,000 acres constitutes public land under the jurisdiction and administration of the Bureau of Land Management.

2. The public land embraced in the area described in plaintiffs' complaint is covered by twenty-nine (29) grazing permits issued prior to January 18, 1954, by the Bureau of Land Management under the authority of the Taylor Grazing Act (43 U.S.C. 315 et seq.) and are still in effect.

3. Action on twelve (12) oil and gas lease applications, covering approximately 9,000 acres in the area described in plaintiffs' complaint, filed under the Mineral Leasing Act (30 U.S.C. 181 et seq.) has been suspended because of the restraining order issued in the above-entitled action.

Four additional applications for oil and gas leases were withdrawn by the applicants due to inability of the Bureau of Land Management to take action thereon because of the restraining order.

4. Action on twenty-seven (27) desert-land applications

filed for lands in the area described in plaintiffs' complaint, under the Desert Land Laws (43 U.S.C., Chapter 9), has been suspended because of the restraining order.

5. Action on three (3) homestead applications filed for lands in the area described in plaintiffs' complaint, under the Homestead Laws (43 U.S.C., Chapter 7) has been suspended because of the restraining order.

6. Action on six (6) public sale applications filed for lands in the area described in plaintiffs' complaint, under the Public Sale Law (43 U.S.C. 1171), has been suspended because of the restraining order.

7. Action on two (2) small tract applications filed for lands in the area described in plaintiffs' complaint, under the Small Tract Law (43 U.S.C. 682), has been suspended because of the restraining order.

[fol. 419] 8. Further action to consummate an exchange of lands between the Federal Government and a private citizen has been suspended because of the restraining order. The exchange was initiated under section 8 of the Taylor Grazing Act (43 U. S. C. 315g). The private citizen deeded his offered land to the Government by a warranty deed executed on December 14, 1953, and title thereto has vested in the Government. The private citizen, in exchange for his land, selected 320 acres within the area described in Plaintiffs' complaint. The Government is unable to pass title to the selected lands to the private citizen because of the restraining order.

9. It is estimated that more than 50,000 mining locations have been recorded under the General Mining Laws (30 U. S. C., Chapter 2) in San Juan County. It is estimated that 13 percent of this total or approximately 6,500 claims are located in the area described in plaintiffs' complaint.

10. In the area described in plaintiffs' complaint, it is estimated that there are approximately 246,000 acres of unsurveyed land. This area has been listed by the State of Utah among the lands which it has requested be surveyed so that school sections 2, 16, 32, and 36 in each township can be identified.

H. Byron Mock, Area Administrator.

Subscribed and sworn to before me this 14th day of June, 1954. Allen S. Crow, Notary Public. My Commission Expires May 13, 1958. (Seal.)

[The petitions of the Navajo Tribe of Indians vs. the United States of America before the Indian Claims Commission, No. 69 and 229, are omitted.]

IN UNITED STATES DISTRICT COURT

ORDER SETTING OVER MOTION TO DISSOLVE JUDGMENT AND RESTRAINING ORDER—June 25, 1954

Defendant's motion to dissolve judgment and restraining order came on before the court for hearing. Llewellyn [fols. 420-421] O. Thomas, Assistant United States Attorney, appeared in behalf of the Government, and Milton A. Oman appeared in behalf of the plaintiffs. The motion was presented to the court, and it was ordered that the entire matter be set over for hearing until such time as is fixed by the court, and at the time the matter will be heard based upon sworn testimony and documentary evidence.

IN UNITED STATES DISTRICT COURT

NOTICE OF APPEAL—Filed July 19, 1954

Notice is hereby given that the United States of America, defendant in the above-entitled action, hereby appeals to the United States Court of Appeals for the Tenth Circuit from the Order entered on June 25, 1954, setting over the Motion to Dissolve the Judgment and Restraining Order until such time as is fixed by the court for a hearing on sworn tesitmony and documentary evidence.

A. Pratt Kesler, United States Attorney, Llewellyn O. Thomas, Ass't. United States Attorney, Attorneys for Appellant.

Filed July 19, 1954.

Clerk's Certificate to foregoing transcript omitted in printing.

[fol. 422] OPINION

UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT,
NOVEMBER TERM, 1954

Nos. 4933 and 4952

UNITED STATES OF AMERICA, Appellant

v.

BILL HATAHLEY, et al., Appellees

Appeals from the United States District Court for the District of Utah

OPINION—March 1, 1955

S. Billingsley Hill (Perry W. Morton, Assistant Attorney General, A. Pratt Kesler, United States Attorney, Llewellyn O. Thomas, Assistant United States Attorney, and John F. Cotter, Attorney, Department of Justice, were with him on the brief), for appellant.

Milton A. Oman (Delbert M. Draper was with him on the brief), for appellees.

Before Murrah and Pickett, Circuit Judges and Savage, District Judge

PICKETT, Circuit Judge:

The plaintiffs, all Navajo Indians, brought this action under the Federal Tort Claims Act, 28 U.S.C.A. Secs. 13-46 (b) and 2671 et seq., to recover damages for the unlawful seizure and destruction of one hundred and fifteen horses and thirty-five burros belonging to plaintiffs. Agents of the Bureau of Land Management, ostensibly acting under [fol. 423] the Utah "abandoned horse" statute, and under the direction of the Board of County Commissioners of San Juan County, Utah, rounded up and disposed of the horses and burros owned by the different plaintiffs. A joint judgment for $100,000 was prayed for and entered by the court. The court also entered a judgment enjoining the United States and its agents from further molesting the plaintiffs and their families in their possession and use of certain public lands; from molesting or interfering with plaintiffs'

livestock on said lands; and from disposing of the lands or any interest therein. Sometime thereafter the trial court denied a motion to dissolve the injunction. The United States has appealed from the judgment and the order overruling the motion to dissolve the injunction.

The complaint alleges that employees of the Department of Interior in the administration of the public domain in the State of Utah, wrongfully and unlawfully seized possession of the thirty-five burros and one hundred and fifteen horses, knowing them to be the property of the plaintiffs, and disposed of or destroyed them. It was alleged that the acts of the agents were part of a plan to deprive the plaintiffs of their livestock; to drive them from their ancestral homes and ranges; to reduce them to a condition of helplessness and want; to subject them to extreme fear and worry; and that the plaintiffs have been grieviously harassed, distressed, persecuted, troubled and reduced to acute and shameful want, and were deprived of means to properly care for their livestock.. The defense was that the plaintiffs' stock was trespassing on public domain which was included in a district created under the Taylor Grazing Act; that permits to use the land had been issued to others; and that the livestock in question had been seized, disposed of, or destroyed under the direction of the Board of County Commissioners of San Juan County, Utah, after a compliance with the Utah "abandoned horse" statute. 5 U.C.A. 1953, Title 47, Ch. 2.

[fol. 424] The area involved is public domain administered under the Taylor Grazing Act (43 U.S.C.A. Sec. 315 et seq.) as part of the Utah Grazing District No. 6 in San Juan County located in the southeast corner of the State of Utah immediately north of the Navajo Indian Reservation. The plaintiffs, although Navajo Indians had not remained on the reservation and had continued to graze their livestock upon the range. Since the creation of the District there has been a continuous effort to prevent non-permittees, including these plaintiffs, from grazing their livestock upon the range. Those who had permits to graze their livestock within the area brought an action in the Utah State Court againt certain Navajo Indians, including some of these plaintiffs, to enjoin them from using the lands. The action resulted in a judgment holding that the

Indians had no right upon the lands and the issuance of an injunction against further use of it by them. Young v. Felornia, Utah , 244 P. 2d 862, cert. den. 344 U.S. 886. In 1950, the United States brought a similar action in the United States District Court of Utah. The trial court entered summary judgment dismissing the complaint but this court reversed, and ordered the complaint reinstated. United States v. Hosteen Tse-Kesi, 10 Cir., 191 F. 2d 518. After remand the case was considered moot and dismissed.[1]

In 1952, after a report that there were abandoned horses on the open range in San Juan County, the Bureau of Land Management, acting upon the recommendation of the District Advisory Board,[2] decided to request the Board of County Commissioners to proceed under the Utah "abandoned horse" statute for the purpose of eliminating aban- [fol. 425] doned horses from this range. The Range Manager of District No. 6 appeared before the Board of County Commissioners on July 1, 1952, and requested that proceedings be instituted for this purpose. A motion to adopt a resolution to authorize such proceedings was unanimously passed, but no record of this action was shown in the minutes of that meeting. The county clerk testified that the failure of the minutes to show this action may have been her fault. The individual members of the Board of County Commissioners signed a resolution on July 9, 1952. This resolution provided that the Advisory Board of Monticello Grazing District, Utah 6, was "exclusively engaged to remove said horses under the direction of this

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[1] The order dismissing the action stated that it appeared to the court upon representation of the Bureau of Land Management, "That the defendants have returned to the Reservation and that there are no more trespassers, the question involved in this case therefore being moot * * *."

[2] The Taylor Grazing Act provides for the creation of an Advisory Board composed of local stockmen in each grazing district. The function of the Board is to make recommendations as to the administration of the Act within the District. 43 U.S.C.A. Sec. 315; Federal Range Code for Grazing Districts, Sec. 161.12(i), 43 CFR 161.12(i).

Commission." Pursuant to the resolution, the statutory notices were published, beginning on July 10, 1952. The notices announced that the elimination drive would start on August 10, 1952, and stated that "All the owners of horses running upon the open range are hereby given notice to file with the Board of County Commissioners within thirty (30) days from the date given below, a description of such horses and the brands and marks thereon. Dated this tenth day of July, 1952. * * *"[3] At the September meeting, the County Commissioners directed that the July 9, 1952, resolution be inserted in the minutes of the Board.

The drive got under way on September 19, 1952, and con- [fol. 426] tinued until the date when this action was filed. Agents of the Bureau of Land Management assisted from time to time by the county sheriff and livestock operators who had grazing permits, rounded up the horses and burros with which we are here concerned, together with a few others. The animals were either driven or hauled in trucks to corrals at nearby Blanding, Utah, where they were kept for a period of about two weeks. A few of the animals were disposed of on the range because they were

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[3] The statutory form of notice is as follows (5 U.C.A. 1953, Title 47, Ch. 2, Sec. 47-2-4):

"Notice is hereby given that in accordance with the provisions of law the board of county commissioners of County, Utah, will proceed to eliminate abandoned horses from the open range in said county, and that beginning on the day of ; 19 , a drive will be held, and all abandoned horses running upon the open range will, under the direction and supervision of the county commissioners, be eliminated. All owners of horses running upon the open range are hereby given notice to file with the board of county commissioners a description of such horses, and the brands or marks thereon.

" Dated this day of , 19 .

"By order of the board of county commissioners of County, Utah.

"

County Clerk

not in condition to be moved, or were injured; some fifteen horses were sold locally; a small number were redeemed and returned to owners; and the remainder were transported by trucks to a packing company near Provo, Utah, where they were sold for not more than three cents per pound. A total of $1,700 was received from the sale of the animals, and that sum was retained by the District Advisory Board as directed by the Board of County Commissioners. All of the horses and burros in question were running on the open range. It was generally known to those who were rounding up the animals that they belonged to Indians, but none of the owners of any of the animals had filed a description of his animals with the Board of County Commissioners showing the marks and brands of his animals as required by the notice. Some of the horses were branded, but there is a dispute as to whether any of the owners had recorded the brands as required by Utah statute. Some of the plaintiffs testified that the brands on their horses were recorded. A representative of the Bureau of Land Management who had a Utah brand book testified that none of the animals were branded with recorded brands. The state brand records were not produced. The trial court found that the horses were plainly branded and that some bore recorded brands.

The trial court held that the roundup and destruction of the plaintiffs' animals was willful, wanton and malicious and part of a plan to drive the plaintiffs from the range; that by the enactment of the Taylor Grazing Act, the United [fol. 427] States undertook complete control and supervision of its own lands; and that the state statutes having to do with the control of livestock thereon became ineffective, but that if the Utah statute were effective, its provisions had not been complied with by the Board of County Commissioners and the proceedings thereunder were a nullity. The court also held that the animals taken and destroyed were not abandoned animals within the meaning of the Utah statute.

As grounds for reversal, the appellant presents four contentions: one, that the district court exhibited such a hostile attitude toward the government's case and its witnesses that it prejudiced appellant's conduct of the trial and the

court's findings and decision; two, that the Utah statute providing for the elimination of abandoned horses from the federal domain was applicable even after the enactment of the Taylor Grazing Act, and such statutes were complied with and the plaintiffs' animals were abandoned within the meaning of the state statute; three, that the damages were excessive; and four, that the trial court erred in entering and continuing a restraining order against the United States.

While the record discloses that the case was tried in an atmosphere of maximum emotion and a minimum of judicial impartiality, and that the amount of the judgment appears to be more for punishment because of the methods used in eliminating the animals, rather than for the damages suffered, we shall not discuss these questions as we have concluded that the case should be disposed of upon the determination of the applicability of the Utah statute. This also makes it unnecessary to consider the validity of the restraining order, or whether the action may be maintained under the Federal Tort Claims Act.[4] Nor will we consider whether [fol. 428] the entry of a joint judgment in a case of this kind, where each plaintiff has a separate claim, is in accordance with Rule 20(a). Fed. Rules Civ. Proc., rule 20(a), 28 U. S. C. A.

Section 161.10 of the Federal Range Code for Grazing Districts (43 CFR 161.10) prohibits the grazing of livestock upon the federal range without an appropriate license or permit. Section 161.11(a) provides that whenever it appears that there has been a willful violation of any provision of the Act, or the Range Code for Grazing Districts, the range manager shall notify the alleged violater and any

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[4] The program was inaugurated by the Board of County Commissioners and the Advisory Board was engaged to effectuate the same under the direction of the County Board. There was no statutory authority authorizing the United States to eliminate abandoned horses from the range. The question of whether the Range Manager in carrying out the program was acting for the Board or the United States was not considered by the trial court. Neither has it been presented here and we shall not consider it.

interested lien holder in writing setting forth the act or acts constituting the violation. If the charge consists of unlawfully grazing livestock on the federal range, Section 161.11(b) requires that the notice served shall order the violator to remove the livestock within a specified time. In case the violator fails to comply with the notice, "the range manager may proceed to exercise the proprietary right of the United States in the Federal range, under local impoundment law and procedure, if practicable; otherwise he may refer the matter through the usual channels for appropriate legal action by the United States against the violator." Violations of the provisions of the Act or the Range Code are punishable by a fine of not to exceed $500.00. 43 U.S.C.A. Sec. 315(a). The remedy provided for in Section 161.11(b) is directed against the individual violators of the code for unlawfully allowing their stock to graze on the federal range, and not against the livestock. It provides no method of impounding the stock except through procedures under the local state statutes. It makes no reference to and has no application whatsoever to a program for the elimination of abandoned stock on the federal range. There is no inconsistency in its provisions and the Utah "abandoned horse" statute. To hold that the Bureau of Land Management is limited to the proceedings under Section 161.11(b) would render it powerless to eliminate abandoned stock from a grazing district, even though an orderly procedure is sanctioned by state law [fol. 429] and has been in effect in the range country for many years.

Article 4, Section 3, Clause 2 of the United States Constitution confers upon Congress the unlimited power to control and dispose of the public domain. Alabama v. Texas, 347 U.S. 272; Federal Power Commission v. Idaho Power Co., 344 U.S. 17. When the congressional power has been exercised within the borders of a state, neither the state nor any of its agencies have power to interfere. Utah Power & Light Co. v. United States, 243 U.S. 389; Griffin v. United States, 8 Cir., 168 F. 2d 457. States may exercise jurisdiction within the limits of the public domain, but this jurisdiction cannot extend to any matter inconsistent with the full

power of the United States to control the use of such lands. Utah Power & Light Co. v. United States, supra.

There is no indication in the Taylor Grazing Act that Congress intended that the entire field of law and management of the public domain was to be preempted by the United States. The Taylor Grazing Act and the Range Code appear to be to the contrary. The purpose of the Act is to stabilize the livestock industry and to permit the use of the public range by qualified permit holders. It seeks to provide for the most beneficial use of the public range and to protect grazing rights. Chournos v. United States, 10 Cir., 193 F. 2d 321, cert. den., 343 U.S. 977; Red Canyon Sheep Co. v. Ickes, App. D.C., 98 F. 2d 308, 43 U.S.C.A. Sec. 315(n) provides: "Nothing in this chapter shall be construed as restricting the respective States from enforcing any and all statutes enacted for police regulation, nor shall the police power of the respective States be, by this chapter, impaired or restricted, and all laws heretofore enacted by the respective States or any thereof, or that may hereafter be enacted as regards public health or public welfare, shall at all times be in full force and effect: *Provided, however*, that nothing in this section shall be construed as limiting or restricting [fol. 430] the power and authority of the United States." It is not suggested that the Utah "abandoned horse" statute does not constitute a proper exercise of the state's police power or that it does not relate to public health or public welfare. The police power of the state extends over the federal public domain within the state unless Congress has determined to deal exclusively with the subject. Omaechevarria v. Idaho, 246 U.S. 343; Colorado v. Toll, 268 U.S. 228; International Bridge Co. v. New York, 254 U.S. 126. We find nothing in the Taylor Grazing Act that suggests an intent to suspend local law which is not in conflict with the provisions of the Act or the regulations promulgated thereunder. On the contrary, we think the Act specifically provides that the local law shall not be suspended.

This brings us to the question of whether the provisions of the Utah "abandoned horse" statute were complied with, and if the animals in question were in fact abandoned horses. The Utah statute provides that Boards

of County Commissioners may provide for the elimination of abandoned horses in the respective counties by causing notice to be published once a week for three successive weeks in some newspaper of general circulation published in the county, and by posting such notice in at least five public places outside the county seat on public highways in such county and in three public places at the county seat, one of which shall be at the front door of the court house. The notices posted outside the county seat must be not less than two miles apart and all posted notices must be posted at least thirty days before the beginning of the elimination of abandoned horses from the range in such county. 5 U.C.A. 1953, Title 47, Ch. 2, Sec. 47-2-4. No question is raised as to the sufficiency of the notices or that they were not published in accordance with the statutory provisions. The evidence is also without conflict that the County Commissioners in a regular meeting authorized the elimination program at the request of the Range Manager. No formal [fol. 431] resolution was adopted at that meeting. None is required by the statute. The procedure of the Commissioners may not measure up to the strictest parliamentary practice, but the record discloses that positive action was taken by the Board in a regular meeting. The fact that the Board later sought to complete its minutes by inserting a resolution therein would not affect the validity of its previous action.

The Utah statute provides that, "It shall be unlawful for any person to suffer or permit any abandoned horse to run at large upon the open range, and every abandoned horse is declared to be a public nuisance and a public menace, and is condemned subject to the right of its owner to reclaim it under the conditions hereinafter provided." 5 U.C.A. 1953, Title 47, Ch. 2, Sec. 47-2-3. "Open range" means all lands not privately owned, including roads, whether or not the same have been formally dedicated to the public. 5 U.C.A. 1953, Title 47, Ch. 2, Sec. 47-2-2.

The owner of any horses which are running at large in any county in which the county commissioners have given notice of intention to eliminate abandoned horses, may within thirty days after the posting of the first publication of notice, file with the Board of County Commissioners a description of his horses, giving the marks and brands, if

any, which appear on them. If the Board of County Commissioners takes into its possession any horses so claimed, it must notify the owner by registered letter that the horses may be claimed within ten days after the mailing of such notice. The owner may take possession of the horses upon the payment of the expenses of caring for them from the date of the capture. If any horse is killed by the County Commissioners after a description has been reported to them, the owner must be paid as damage not exceeding the sum of Ten Dollars for each animal, provided taxes assessed against the animal have been paid. 5 U.C.A. 1953, Title 47, Ch. 2, Sec. 47-2-6. The plaintiffs in this action filed no [fol. 432] claims or descriptions of horses with the Board as required by the notices. Under such circumstances the statute does not require the Board to make any inquiry concerning the ownership of the horses rounded up.

The Utah statute clearly defines the term "abandoned horse" and contemplates their destruction. It is said to mean, "any horse, ass, mule, or other animal of the genus equus, unbranded, or, if branded, that has escaped assessment for taxation for the year next preceding the killing of such animal as hereinafter provided for, and running at large upon the open range of this state, * * *. An animal not bearing a decipherable brand recorded in the office of the recorder of marks and brands shall be deemed unbranded." 5 U.C.A. 1953, Title 47, Ch. 2, Sec. 47-2-1. Clearly, under the terms of this statute, any horse which is unbranded or any branded horse which has escaped assessment for taxation the year preceding the one in which it was killed, is an abandoned horse. The dictionary definition of the term "abandoned" has no application.

The plaintiffs seek to recover damages for the unlawful disposition of their animals. The County Commissioners lawfully inaugurated a program to eliminate abandoned horses from the open range and lawfully disposed of animals which belonged to the plaintiffs. The burden is upon the plaintiffs to prove that they complied with the notices and that the animals which belonged to them and which were disposed of, were not abandoned horses as defined by the statute. This they failed to do. The actual knowledge of the ownership of the abandoned animals by the County Commissioners or those in charge of the elimination pro-

gram in their behalf is not material, and the Utah statute is clear on the subject. The statute provides a method whereby the plaintiffs could have obtained their animals and since they failed to avail themselves of that right, they cannot complain. The method of disposing of abandoned [fol. 433] horses may appear to be harsh, but the remedy, if any, is in the legislature and not the courts.

Judgment is reversed and the cause remanded with instructions to dissolve the injunction and enter judgment for the defendant.

[fol. 434] In United States Court of Appeals for the Tenth Circuit

Judgment—March 1, 1955

Before Honorable Alfred P. Murrah and Honorable John C. Pickett, Circuit Judges, and Honorable Royce H. Savage, District Judge.

These causes came on to be heard on the transcript of the record from the United States District Court for the District of Utah and were argued by counsel.

On consideration whereof, it is ordered and adjudged by this court that the judgment of the said district court in these causes be and the same is hereby reversed, and that these causes be and the same are hereby remanded to the said district court with instructions to dissolve the injunction and enter judgment for the defendant.

[By order entered March 17, 1955, the time for appellees' petition for rehearing was extended to April 5, 1955.]

[fol. 435] Petition for rehearing covering 20 pages, filed, omitted from this print. It was denied, and nothing more by order.

[fol. 436] IN UNITED STATES COURT OF APPEALS

ORDER DENYING APPELLEES' APPLICATION TO HAVE PETITION FOR REHEARING HEARD EN BANC.—April 15, 1955

Before Honorable Orie L. Phillips, Chief Judge, Honorable Sam G. Bratton, Honorable Walter A. Huxman, Honorable Alfred P. Murrah and Honorable John C. Pickett, Circuit Judges, and Honorable Royce H. Savage, District Judge.

This cause came on to be heard on the application of appellees to have the petition for rehearing herein heard en banc.

On consideration whereof, it is ordered that the said application be and the same is hereby denied.

IN UNITED STATES COURT OF APPEALS

ORDER DENYING APPELLEES' PETITION FOR REHEARING.—April 15, 1955

Before Honorable Alfred P. Murrah and Honorable John C. Pickett, Circuit Judges, and Honorable Royce H. Savage, District Judge.

This cause came on to be heard on the petition of appellees for a rehearing herein and was submitted to the court.

On consideration whereof, it is now here ordered by the court that the said petition be and the same is hereby denied.

[fol. 437] Clerk's Certificate to foregoing transcript omitted in printing.

[fol. 438] SUPREME COURT OF THE UNITED STATES

[Title omitted]

ORDER ALLOWING CERTIORARI.—Filed October 10, 1955

The petition herein for a writ of certiorari to the United States Court of Appeals for the Tenth Circuit is granted.

And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

(5274-6)

Office Supreme Court, U. S.
FILED
JUL 13 1955
HAROLD B. WILLEY, Clerk

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1955

No. 231

BILL HATAHLEY, ET AL., *Petitioners*

v.

UNITED STATES OF AMERICA

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT.

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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1955

No.

BILL HATAHLEY, ET AL., *Petitioners*

v.

UNITED STATES OF AMERICA

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT.

Petitioners, by their attorney, pray that a writ of certiorari issue to review the judgment entered in this case on March 1, 1955, by the United States Court of Appeals for the Tenth Circuit, reversing the judgment in favor of petitioners rendered January 30, 1954, by the United States District Court for the District of Utah.

Opinions Below

The opinion of the court of appeals is reported at 220 F. 2d 666. (Clerk, Ct. of App., Tr. 3-14.) The oral opinion of the district court appears at R. 400-405. The findings of fact and conclusions of law of the district court appear at R. 19-49.

Jurisdiction

The judgment of the court of appeals was entered on March 1, 1955. A petition for rehearing was denied on

April 15, 1955. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

Question Presented

Whether agents of the Department of the Interior, purporting to act under the Utah "abandoned horse" statute, may confiscate and destroy livestock belonging to Navajo Indian wards of the United States, as a pre-determined method of driving the Indians from their ancestral homes on the federal range, without liability to the Indians under the Tort Claims Act, 28 U.S.C. 1346(b) and 2671 *et seq.*

Statutes Involved

The pertinent provisions of the Taylor Grazing Act of June 28, 1934, 48 Stat. 1269, as amended, 43 U.S.C. 315 *et seq.*; the Federal Range Code, 43 CFR 161.1 *et seq.*; and 5 Utah Code Annotated, 1953, Title 47, Chapter 2,[1] are printed in the Appendix, pp. 19-24.

Statement

Petitioners are Navajo Indians and wards of the federal government. They instituted this suit under the Tort Claims Act to recover compensation for the unlawful slaughter of their livestock by agents of the United States.[2] In this way, the Navajos seek redress for the damages they suffered when federal officers, under the subterfuge of enforcing a state statute carried out their real objective of forcing petitioners to flee from their ancestral homes, by capturing and brutally destroying the Indians' horses, the most important element in their native economy.

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[1] This also appears as Title 64, Chapter 2, Utah Code Annotated, 1943, which was in force during the period in controversy.

[2] There is no question here as to the authority of the Government agents to take the action complained of by petitioners. This was admitted by the United States Attorney during the trial before the district court. (R. 78).

To fully appreciate the vicious character of the acts committed by respondent's agents, we must examine the environment in which they occurred. From time immemorial, petitioners and their families have lived in permanently constructed "hogans" upon an area of what is now public land in the southeastern corner of Utah. The Navajo Indians are herdsmen, and for many generations continuously grazed horses and other livestock upon the land. (Fdgs. 1, 8, 17, R. 19, 25, 29.) In view of the limited resources of their country, the horse has become a vital part of the Indians' culture and economy, serving as beast of burden and as means of transportation, and, indeed, is a part of their religious life. (Fdgs. 9-14, R. 25-28.)

Following passage of the Taylor Grazing Act of June 28, 1934, 48 Stat. 1269, as amended, 43 U.S.C. 315 *et seq.*, the area used by petitioners was incorporated within the boundaries of Utah Grazing District No. 6. (Fdg. 3, R. 20-21.) Permits to graze in the area were issued to white livestock operators. (Fdg. 4, R. 21.) Until 1946, the Navajos were not disturbed in their use of these lands for grazing purposes in common with non-Indians. After the employment of a new federal Range Manager in that year, however, the respondent's agents commenced a deliberate, and increasingly intensive campaign of harassment and molestation to frighten the Navajos into surrendering possession of the area. Federal officers threatened the destruction of livestock and the imprisonment of individual Indians. They went so far as to seize and chain the wives of four of the petitioners—one with an infant in arms. On another occasion, they threatened to take small children from a Navajo widow, to put her in jail, and to destroy her livestock unless she left the country. She immediately left the country. (Fdgs. 17-20, R. 29-32.)

In 1950, resorting to more regular legal recourse, the United States brought suit in the federal district court to

enjoin Navajos, including some of the petitioners, from grazing their livestock in the area.[3] Contemporaneously, local stockmen instituted similar proceedings in the Utah state court.[4] Apparently, however, the operation of orderly judicial process did not satisfy the respondent's agents. Without awaiting the ultimate disposition of either of these proceedings, the Range Manager for the Department of the Interior, at his own instance, initiated administrative steps looking towards the destruction of the Indians' horses and only the Indians' horses.

The federal regulations concerning livestock trespasses on public lands require that any "alleged violator * * * be served with a written notice * * *." 43 CFR 161:11 (a). (Fdg. 5, R. 22.) No such notice was served in this case. (R. 401), although the Government agents knew to whom the horses belonged and could identify their brands, all of which were plain and some of which were recorded under state law. (Fdgs. 24, 28, 30, R. 35, 38, 40.) Instead, the Range Manager purported to invoke a Utah statute, commonly referred to as the "abandoned horse" statute, which had been enacted in 1927 (Fdg. 6, R. 22). Utah Code Annotated, Title 64, c. 2, secs. 1-7 (1943).

The state statute, in providing a method for eliminating "abandoned horses"[5] from the range, called for pub-

[3] *United States* v. *Hosteen Tse-Kesi*, 93 F. Supp. 745 (D., Utah; October 31, 1950). The district court's judgment of dismissal was reversed and the complaint reinstated for further proceedings. *United States* v. *Hosteen Tse-Kesi*, 191 F.2d 518 (C.A. 10; August 30, 1951). Several months after the Indians had been driven from the range by the Government's agent, as set out in this case, the United States represented that the case was moot and the district court dismissed. (Fdg. 18, R. 30.)

[4] *Young* v. *Felornia*, — Utah —, 244 P.2d 863 (May 21, 1952) certiorari denied 344 U.S. 886 (November 17, 1952).

[5] An "abandoned horse" is defined in the Utah statute as any such animal "unbranded, or, if branded, that has escaped assessment for taxation for the year next preceding * * * and running at large upon the open range of this state * * *. An animal not bearing a decipherable

lished and posted notices, authorized by the Board of County Commissioners, to the effect that the elimination of such livestock would begin on a certain day. About July 9, 1952, the federal Range Manager approached one of the three Commissioners on the street and advised him of a plan to invoke the "abandoned horse" law. The individual Commissioner interposed no objection. (Fdg. 21, R. 32.) On the next day, July 10, the first published notice of a program to eliminate abandoned horses appeared. Subsequently, when publication had been completed, the Range Manager, realizing that there had been no official authority from the Board of County Commissioners, called on a second Commissioner, suggesting that some authorization for his acts be made a matter of record. At a Board meeting held September 2, 1952, there was set out in the minutes for the first time a resolution dated July 9, 1952, prior to the date of first publication of notice under the "abandoned horse" statute, purportedly approving that program. (Fdg. 21, R. 32-33.)[6]

Beginning on September 20, 1952, and continuing until this action was instituted on March 20, 1953, the respondent's agents captured and completely destroyed the Indians' horses. (Fdg. 19, R. 31.) The animals were rounded up on the range and were either driven or hauled in trucks to corrals up to 45 miles away. Horses which

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brand recorded in the office of the recorder of marks and brands shall be deemed unbranded." Utah Code Annotated, Title 64, c. 2, sec. 1, 1943.

[6] There was a conflict of oral testimony on the question of whether the County Board had ever acted on the request to invoke the "abandoned horse" statute prior to September 2, 1952. The district judge, after observing the witnesses, and hearing them testify, and noting the inconsistencies in their testimony, was of the view that respondent's witnesses were not telling the truth concerning adoption of the resolution (R. 402-403). The district court found the resolution was not properly adopted prior to the meeting of September 2, 1952. (Fdg. 21, R. 34, 44.) The court of appeals, however, disregarded this finding and took the view that a proper resolution had been in force prior to the advertising of the notice (220 F.2d 668-669).

could not be so handled were shot and killed by the Government's agents on the spot. The remainder were accorded brutal treatment: the horses were so jammed together in the trucks that some died as a result; and in one instance a horse's leg inconveniently protruding through the truck body was sawed off by a federal employee. (Fdg. 25, R. 36.) Later, the animals were taken in trucks to Provo, Utah, a distance of 350 miles, where they were sold to a glue factory and horse meat plant for about $1,700, no part of which was received by petitioners. (Fdg. 24, R. 35-36.)

The respondent's agents were engaged in the wholesale slaughter of Indian livestock, without regard to existing property rights, as part of a preconceived plan to drive these Indians from their homes by destroying their means of livelihood. After all, the Government's concern was not with 150 horses and burros on an area where permits had been issued for the grazing of 3,899 cattle and 33,818 sheep (R. 398). It was the Indians themselves that these federal agents sought to remove through destruction of the horses. For this reason, the respondent's agents did not intend to permit the redemption of Navajo horses and granted no opportunity for redemption. (Fdg. 24, R. 35-36.) On one occasion, where one of the petitioners located his horses and asked to be permitted to reclaim them, payment of $60 per head was demanded by the Range Aid, a sum the federal employee knew the Indian could not pay. (Fdg. 26, R. 36-37.) In another instance, petitioner Hosteen Sakezzie and his family tracked their animals 35 miles to the Government corral, where Sakezzie requested the federal Range Aid to return his horses. (Fdg. 27, R. 37.) During the conversation, one of the white stockmen left in his car and returned in a few minutes with several men armed with rifles, the loading mechanisms of which were worked before the Indians to convey to them

the understanding that respondent's agents were prepared to shoot the Indians if they attempted to retake their horses. (Fdg. 27, R. 37.) Sakezzie and his family became so frightened and intimidated by the threatening display of firearms that they departed peaceably and returned to their hogan without obtaining the horses. (Fdg. 27, R. 37-38.) By contrast, five horses belonging to white men and unavoidably gathered with petitioners' horses were delivered by federal officers directly to the pastures or corrals of their owners, with a handling charge of only $2.50 per head. (Fdg. 26, R. 36.)

The district court concluded that the provisions of the Utah "abandoned horse" statute on which the Government relied were not applicable, because the United States, by the enactment of the Taylor Grazing Act, had undertaken complete control of its own lands; that the requirements of the Taylor Grazing Act and the regulations issued thereunder, particularly 43 CFR 161.11, concerning written notice, had not been followed by the agents of the Department of the Interior; that, even if the Utah statute were applicable, its provisions concerning authorization from the County Board had not been satisfied; and that, in any event, petitioners' horses were not "abandoned horses" within the meaning of the Utah statute. (R. 43-47, 400-405).

In so holding, the district court recognized the unique position of the horse in the Navajo culture and economy, and the unique value of these animals to the petitioners. (Fdgs. 8-16, 29, R. 25-29, 38-40.) The court further recognized the dreadful consequences, in terms of financial loss and personal injury, visited upon these Indians by the acts of federal officers in wantonly destroying the basic means by which they gained their livelihood and, indeed, maintained their very existence. (Fdgs. 31, 1-3, R. 40-43.) The Navajos' horse is part of his way of life, specially trained and bred over many generations, essential to his spiritual

and material well being. Peculiarly adapted to the desolate country in which petitioners live, these animals can carry heavy burdens up to three days without feed or water. (Fdg. 15, R. 28.) They are used to till the dry land crops; they haul water, wood and supplies great distances; they transport petitioners' families, the aged and the sick. (Fdg. 10, R. 26.) Understanding only Navajo commands, the horse is the prized possession of the Navajo. (Fdg. 15, R. 28.) A horse is an inseparable part of Navajo family and religious life, the best horse being selected to ride with his dead master into the after world. (Fdg. 14, R. 28.)

For the confiscation of that irreplaceable asset, the district court granted a judgment for $100,000. *Sua sponte* it entered an order enjoining the respondent's agents from further molesting petitioners pending further action by the court. (R. 49-51.)

The court of appeals reversed the judgment of the district court and directed entry of judgment for the United States. (Clerk, Ct. of App., Typed Tr. 15, 220 F. 2d 666, 672.) The appellate court based its decision on the applicability of the Utah "abandoned horse" statute (220 F. 2d at 670-671), and, disregarding the findings of the district court, also stated that the procedural provisions of the state law had been complied with in the elimination of petitioners' animals and that those animals were "abandoned horses" within the meaning of the statute. 220 F. 2d at 671-672.

Reasons for Granting the Writ

I

This Case Presents an Important Question of Federal Law Which Should Be Settled by This Court

This case presents a direct conflict between the dual obligations of the Department of the Interior as guardian of

the Indians and as administrator of the public range. The respondent's agents, taking advantage of their position of authority over petitioners, destroyed their property for alleged conservation purposes. The court of appeals sanctioned such a subordination of the Government's responsibilities for a helpless people to its interest in land. The validity and wisdom of that decision raises an important question of federal law which has not been, but should be, settled by this Court.

II

Petitioners Have Been Deprived of Their Property Without Compliance With Statutory Requirements or Due Process of Law

Petitioners, as individual Navajo Indians, not only are citizens of the United States (Act of June 2, 1924, 43 Stat. 253, 8 U. S. C. 1401), but also are wards of the federal government. *United States* v. *Kagama*, 118 U. S. 375, 383-4. As such, their private property rights enjoy "the protection guaranteed by the Constitution" and "are secured and enforced to the same extent and in the same way as other residents or citizens of the United States." *Choate* v. *Trapp*, 224 U. S. 665, 677. In addition, petitioners are entitled to the highest performance of the fiduciary obligations owed by the United States to its Indian wards, both tribal and individual. *Cramer* v. *United States*, 261 U. S. 219, 232-233.

In this case, the respondent's agents, as part of a concerted campaign to drive petitioners from their ancestral homes, captured and brutually slaughtered the Indians' horses and, for all practical purposes, destroyed their only means of livelihood. The decision of the court of appeals, denying recovery for these substantial property losses, in effect sanctions action by officers of the United States which

is arbitrary, unlawful and in direct derogation of the statutory and constitutional rights of petitioners.

1. *The destruction of petitioners' animals and the resulting eviction of petitioners from their ancestral homes were contrary to the Taylor Grazing Act.*

Section 3 of the Taylor Grazing Act (48 Stat. 1270, 43 U. S. C. 315b) specifically provides that preference shall be given in the issuance of grazing permits to "bona fide occupants" of the lands, while Section 5 of the Act (48 Stat. 1271, 43 U. S. C. 315d) states in part:

> The Secretary of the Interior *shall permit*, under regulations to be prescribed by him, *the free grazing* within such districts *of livestock kept for domestic purposes* * * *. [Emphasis supplied.]

This statutory language is mandatory. To carry out the express objective of Section 5, therefore, the Federal Range Code provides for the issuance of free-use licenses for grazing livestock kept for domestic purposes, such grazing to be conducted on the federal range within the immediate vicinity of the licensee's residence. 43 CFR 161.6(a).

In this case, the district court found as a fact that petitioners have maintained their residence on these lands for many generations (Fdg. 1, R. 19), and that the animals captured and destroyed by the federal officers were owned and kept by the Indians for domestic purposes, serving as the foundation of their primitive economy. (Fdgs. 9-14, R. 25-28.) The record further discloses that this situation was well known to the Government agent conducting the slaughter of the Navajos' horses (Fdgs. 17, 28, R. 29, 38). Consequently, petitioners, as occupants of the area, were entitled to a preferential status and, under the mandatory requirement of 43 U. S. C. 315d, it was the duty of the Department of the Interior to issue free-use grazing per-

mits to these Indians for domestic purposes and to safeguard the rights of petitioners under those permits.[7] Indeed, for twelve years after passage of the Taylor Grazing Act the petitioners were permitted to graze their horses in the area.

Instead of continuing to protect a helpless, ignorant and poverty-stricken group of Indian wards, the federal agents, in an arbitrary and unnecessarily cruel manner, effected the confiscation and killing of petitioners' domestic animals to carry out the predetermined purpose of summarily forcing the Navajos to flee their permanent homes. This sadistic action of Government officers, in addition to disregarding all concepts of fair play and simple justice to an underprivileged people, was in direct violation of the Indians' rights under the Taylor Grazing Act.

2. *In destroying petitioners' livestock, the Government's agents failed to comply with the provisions of the Federal Range Code.*

Since the Taylor Grazing Act contains no specific provision for the enforcement of its requirements and prohibitions, these subjects are covered in the Federal Range Code promulgated pursuant to the Act.[8] (43 CFR, Part 161.) Section 161.11(a) of that Code stipulates that, whenever there appears to be a willful violation of any provision of the Taylor Grazing Act or the Range Code, the range manager shall notify the alleged violator in writing setting forth the act or acts constituting the alleged violation. Under section 161.11(b), whenever the charge consists of unlawfully grazing livestock on the federal range, the notice

[7] Even in instances where petitioners, through ignorance or otherwise, failed to apply for permits, it was the responsibility of the Department of the Interior, as guardian, to see that domestic-purpose permits were issued to the Indian wards of the United States.

[8] Pertinent portions of the Federal Range Code, 43 CFR, Part 161, are set out in the Appendix, pp. 20-21.

will order the violator to remove the stock. Section 161.11(b) further provides:

> If the alleged violator fails to comply with the notice the range manager may proceed to exercise the proprietary right of the United States in the Federal range, under local impoundment law and procedure, if practicable; otherwise he may refer the matter through the usual channels for appropriate legal action by the United States against the violator.

A reading of 43 CFR 161.11(a) and (b) thus discloses that, as a mandatory condition precedent to the exercise by the range manager of the "proprietary right of the United States * * * under local impoundment law and procedure", there must first have been served on the alleged violator a *written notice* and order concerning the violation, and a failure to comply with that order.

No such written notice, as required by the Range Code, was ever served on petitioners. (R. 401.) Before the court of appeals, respondent successfully contended that compliance with these regulations was not necessary because 43 CFR 161.11(b) purportedly applies only to *known* owners of trespassing animals and the actual ownership of the horses was not clear. As a matter of fact, this argument is wholly unjustified. The district court specifically found that the Government's agents knew to whom the horses belonged [9] and could identify their brands, all of which were plain and some of which were recorded under state law (Fdgs. 24, 28, 30, R. 35, 38, 40), and these facts were recognized by the court of appeals (220 F. 2d at 669). Since the petitioners' ownership of the animals was known to the federal officers, the regulation required that the prescribed

[9] In at least one instance, employees of the Department of the Interior spied upon the home of an Indian until he turned out his animals for forage at night, at which time these agents seized the livestock. (Fdg. 27, R. 37.)

procedure, including *written notice* to the Indians, be followed. Certainly, this simple procedural rule should have been honored where the very livelihood of the individuals affected was at stake.

Regardless of whether notice was given, the actions of the Government's agents in slaughtering petitioners' horses in 1952 demonstrated the complete contempt with which they viewed orderly judicial process. Section 161.11(b) provides for the institution of appropriate legal proceedings to remove livestock from the federal range. During all the time these horses were being destroyed, such proceedings actually were pending before the federal district court, and several of the petitioners were defendants in that case, *United States* v. *Hosteen Tse-Kesi*, 95 F. Supp. 745, reversed 191 F. 2d 518. A final decision in that proceeding would have been a judicial determination of the Indians' right to occupy and graze their animals on these lands.

The respondent's agents chose not to await the outcome of orderly judicial process. Instead, although fully aware of the pending litigation in which they appeared as witnesses, they went out on the range, destroyed the Indians' horses and drove petitioners from the country. Then, these same federal officers had the effrontery to advise the district court that the case was moot because the Navajos no longer were in the area, but did not inform the court of the circumstances under which they were removed. (Fdg. 18, R. 30.) As a result, the proceeding was dismissed.

3. *The brutal destruction of petitioners' livestock by federal officers, ostensibly acting pursuant to state law, constituted a denial of due process.*

The court of appeals reversed the judgment of the district court on the sole ground that the Utah "abandoned horse" statute, a state police power measure, was controlling and properly applied. The court of appeals was in error.

In the first place, the agents of the Department of the Interior are not authorized, by federal regulation or otherwise, to use a state livestock law as a subterfuge for driving Indians from their homes on the public domain. Secondly, even assuming that the Taylor Grazing Act does not preclude the operation of state police measures within federal grazing districts, those remedies may be enforced only by state officers and not by employees of the United States.

Apart from the foregoing considerations, however, the provisions of the Utah "abandoned horse" statute were not followed by respondent's agents in this case. Section 4 of that law requires an authorization by the Board of County Commissioners prior to the commencement of any program to eliminate abandoned horses from the range. Utah Code Annotated, Title 64, c. 2, sec. 4 (1943). The district court found as a fact, based on oral testimony, that there was no such prior authorization by either the Board of County Commissioners or the District Advisory Board. (Fdgs. 21-22, R. 32-35.) The conclusion follows that the confiscation of petitioners' property was not sanctioned.

Lastly, the court of appeals overlooked a fatal defect in the procedure adopted by the federal agents in killing the Indians' horses in that no adequate notice was given to warn the petitioners of the catastrophic loss with which they were faced. The Constitution guarantees that no person shall be deprived of property without due process of law, and among the indispensable elements of due process are the right to reasonable and adequate notice and an opportunity for a hearing. *Milliken* v. *Meyer*, 311 U.S. 457, 463; *Powell* v. *Alabama*, 287 U.S. 45, 68. Moreover, that notice and hearing must be "appropriate to the nature of the case." *Mullane* v. *Central Hanover Bank & Trust Co.*, 339 U.S. 306, 313. If found to be "arbitrary, oppressive and unjust, it may be declared to be not 'due process of law'." *Davidson* v. *New Orleans*, 96 U.S. 97, 107.

In this case, the Navajos had been living and grazing livestock upon these lands since time immemorial. (Fdg. 1, R. 19.) Even after incorporation of the area into a grazing district, they had not been disturbed in their use of the country in common with their non-Indian neighbors for many years. (Fdg. 17, R. 29.) Notwithstanding this situation, the Government's agents undertook a drastic program to wipe the petitioners' horses off the face of the earth. The only prior notice of this impending confiscation was published in a local newspaper and posted at five or six places in the county, on fence posts and sagebrush.

Insofar as the petitioners are concerned, such notice was neither reasonable nor adequate. In the first place, the printed form was not likely to come to the attention of Indians who lived off in a desert area and rarely visited town. Even if it had been seen, this warning could not possibly be understood by ignorant Navajos who do not speak, read or write English. (Fdg. 15, R. 28.) Only by an understanding of the detailed procedures set forth in the notice could the petitioners move to protect their rights. The general notice given, therefore, falls far short of the strict requirements of due process, particularly where the contemplated Government action constitutes a taking of the personal property of known owners, all of whom are wards of the United States dependent upon such animals for their livelihood. See *Mullane* v. *Central Hanover Bank & Trust Co.*, *supra*, at p. 315; *Cramer* v. *United States*, *supra*, at pp. 232-233.

The question in this case is not whether the published and posted notices were adequate under the law as against persons other than Indians. The wrongs complained of were committed against Navajo Indian wards by employees

of the federal government,[10] who knew the horses belonged to petitioners, who knew that petitioners could not understand the published notices, and who knew that the destruction of their livestock would leave the Indians destitute and force them out of the area. The brutal confiscation of the Navajos' animals by federal officers without warning thus was a flagrant denial of due process.

III

Petitioners Were Denied Equal Protection of the Laws

The Equal Protection Clause of the Fourteenth Amendment, and its implied counterpart in the Fifth Amendment (*Bolling* v. *Sharpe*, 347 U.S. 497, 499), guarantee to every person the equal protection of the laws, particularly in the right to own and enjoy property. *Shelley* v. *Kraemer*, 334 U.S. 1, 10-11. In determining whether equal protection of the laws has been denied, it is not merely the language of a statute or regulation which must be examined, for "though the law itself be fair on its face and impartial in appearance, yet, if it is applied and administered by public authority with an evil eye and an unequal hand, so as practically to make unjust and illegal discrimination between persons in similar circumstances, material to their rights, the denial of equal justice is still within the prohibition of the Constitution." *Yick Wo* v. *Hopkins*, 118 U.S. 356, 373-374. See also *Raymond* v. *Chicago Union T. Co.*, 207 U.S. 20, 35-36.

In this case, the action of the Interior Department agents, either as administrators of federal land regulations or as executors of the Utah "abandoned horse" statute, was

[10] As the district court found, the County Board and the Advisory Board did no more than attempt, imperfectly, to approve the action of the federal agents (Fdgs. 21, 22, R. 32-35).

a denial of equal protection of the laws to petitioners, because of the openly discriminatory manner in which the confiscation of the horses was conducted. As has been pointed out, *supra*, p. 6, none of petitioners was given any real opportunity to redeem his animals (Fdgs. 24, 27, R. 35-36, 37). Moreover, where a request for redemption was made an agent of the defendant set the charges at $60 a head, a figure known to be more than petitioners could pay (Fdg. 26, R. 36-37). At the same time, however, the five horses belonging to white men, which were unavoidably included in the roundup, were promptly returned directly to the pastures or corrals of the owners, at a charge of only $2.50 per head (Fdg. 26, R. 36-37). This was discrimination at its worst, directed at these Navajo Indians as a class.[11] A more shocking example of the denial of equal protection, as a result of arbitrary administrative action, could hardly be found.

[11] The district court found that the government's agent intended to capture only petitioners' horses (Fdg. 24, R. 35). Of significance also are the district court's findings that the real objective of the horse roundup was to deprive the Indians of the animals essential to their way of life and thus force them to leave the area (Fdgs. 20, 29-3, R. 32, 40, 42-43).

Conclusion

This case reveals a shameful chapter in the history of the Government's dealings with its Indian wards. Only this Court can remedy the wrong sanctioned by the judgment of the court of appeals. The petition for certiorari should be granted.

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APPENDIX

The Taylor Grazing Act, as amended, 43 U.S.C. 315 *et seq.*, provides, in part, as follows:

Sec. 315a.

The Secretary of the Interior shall make provision for the protection, administration, regulation, and improvement of such grazing districts as may be created under the authority of section 315 of this title, and he shall make such rules and regulations and establish such service, enter into such cooperative agreements, and do any and all things necessary to accomplish the purposes of this chapter and to insure the objects of such grazing districts, namely to regulate their occupancy and use, to preserve the land and its resources from destruction or unnecessary injury, to provide for the orderly use, improvement, and development of the range; * * * and any willful violation of the provisions of this chapter or of such rules and regulations thereunder after actual notice thereof shall be punishable by a fine of not more than $500.

Sec. 315b.

The Secretary of the Interior is authorized to issue or cause to be issued permits to graze livestock on such grazing districts to such bona fide settlers, residents, and other stock owners as under his rules and regulations are entitled to participate in the use of the range, * * *. Preference shall be given in the issuance of grazing permits to those within or near a district who are landowners engaged in the livestock business, bona fide occupants or settlers, or owners of water or water rights, as may be necessary to permit the proper use of lands, water or water rights owned, occupied, or leased by them, * * *.

Sec. 315d.

The Secretary of the Interior shall permit, under regulations to be prescribed by him, the free grazing within such districts of livestock kept for domestic purposes; * * *

The pertinent provisions of the Federal Range Code, 43 CFR 161.1 *et seq.*, provide:

Sec. 161.6 *Issuance of licenses and permits*—(a) *Free-use licenses and permits.* Free-use licenses or permits first will be issued to free-use applicants for not to exceed the number of livestock kept for domestic purposes. Such livestock shall be grazed on Federal range in the immediate neighborhood of the residence of the licensee or permittee.

Sec. 161.11 *Procedure for enforcement or rules and regulations*—(a) *Service of notice.* Whenever it appears that there has been any willful violation of any provision of the act or of the Federal Range Code for Grazing Districts, the range manager will cause the alleged violator and any interested lien holder who has filed notice of his lien with the Bureau of Land Management to be served with a written notice, which will set forth the act or acts constituting such violation and in which reference will be made to the provision or provisions of the act or the Federal Range Code for Grazing Districts alleged to have been violated. Such notice may be served in person or by registered mail and the affidavit of the person making personal service or the registry receipt shall be preserved.

(b) *Unlawful grazing on Federal range; removal of livestock; impoundment.* Whenever the charge consists of unlawfully grazing livestock on the Federal range, the notice served on the alleged violator and

any interested lien holder who has filed notice of his lien with the Bureau of Land Management will order the alleged violator to remove the livestock or to cause them to be removed immediately or within such reasonable time as may be specified. If the alleged violator fails to comply with the notice the range manager may proceed to exercise the proprietary riglit of the United States in the Federal range, under local impoundment law and procedure, if practicable; otherwise he may refer the matter through the usual channels for appropriate legal action by the United States against the violator.

5 Utah Code Annotated, 1953, Title 47, Chapter 2, provides:

47-2-1. *"Abandoned Horse" Defined.*

The term "abandoned horse" as used in this chapter means any horse, ass, mule or other animal of the genus equus, unbranded, or, if branded, that has escaped assessment for taxation for the year next preceding the killing of such animal as hereinafter provided for, and running at large upon the open range of this state, and includes a foal running with a dam coming within the above definition. An animal not bearing a decipherable brand recorded in the office of the recorder of marks and brands shall be deemed unbranded.

47-2-2. *"Open Range" Defined.*

The term "open range" means all land not privately owned, and includes all roads, outside of private inclosures, used by the public, whether the same have been formally dedicated to the public or not.

47-2-3. *Abandoned Horses on Open Range; A Nuisance.*

It shall be unlawful for any person to suffer or permit any abandoned horse to run at large upon the open range, and every abandoned horse is declared to be a public nuisance and a public menace, and is condemned subject to the right of its owner to reclaim it under the conditions hereinafter provided.

47-2-4. *Elimination by County Commissioners—Notice of Intention.*

The board of county commissioners may provide for the elimination of abandoned horses in the respective counties in the following manner:

They shall cause notice to be published at least once a week for three successive weeks in some newspaper of general circulation published in the county, and such notice shall also be posted in at least five public places outside of the county seat on public highways in such county, and in three public places at the county seat, one of which shall be at the front door of the court house. The notices posted outside of the county seat shall be posted not less than two miles apart, and all posted notices shall be posted at least thirty days before the date which the county commissioners shall fix for the beginning of the elimination of abandoned horses from the range in such county as hereinafter provided. If no newspaper is published in the county, publication in a newspaper shall not be required.

Such notice shall be substantially in the following form:

Notice is hereby given that in accordance with the provisions of law the board of county commissioners of County, Utah, will proceed to

eliminate abandoned horses from the open range in said county, and that beginning on the day of , 19 , a drive will be held, and all abandoned horses running upon the open range will, under the direction and supervision of the county commissioners, be eliminated. All owners of horses running upon the open range are hereby given notice to file with the board of county commissioners a description of such horses, and the brands or marks thereon.

Dated this day of , 19 .

By order of the board of county commissioners of County, Utah.

County Clerk.

47-2-5. *Elimination by County Commissioners—Method.*

The manner and method of eliminating abandoned horses from the open range shall be in the discretion of the board of county commissioners, and it shall be its duty to so eliminate abandoned horses, using the means most effective and economical under the circumstances. The board may, in its discretion, sell all captured horses.

47-2-6. *Owners May Repossess—Damages—Taxes.*

Any person owning any horses which are running at large in any county in which the board of county commissioners has given notice of intention to make a drive, as provided in this chapter, may within thirty days after posting or the first publication of the notice mentioned in section 47-2-4 file with the board of county commissioners a description of such horses claimed by him, giving the marks and brands, if any, which appear thereon, and, if the board of county commissioners

shall take into its possession any horses so claimed, it shall by registered letter addressed to the owner or claimant of such horses notify him that the same may be claimed within ten days from the mailing of such notice; and such owner or claimant shall be permitted upon application to the board to take possession of such horses upon payment of the expense of caring for the same from the date of capture. If any horses are killed by the county commissioners under the provisions of this chapter, a description of which has been reported by the owner thereof to the board, and ownership of such animals can be satisfactorily established, such owner shall receive as damage therefor a sum not exceeding $10 for each animal; *provided*, that he has paid all taxes assessed against said animal; *provided further*, that payment of such claims may be made only from proceeds of sales of captured horses.

47-2-7. *Elimination from Private Property on Request.*

Abandoned horses may be eliminated from privately owned land by the board of county commissioners in the same manner as from the open range when requested so to do by the owner of such land.

SUPREME COURT, U.S.

Office Supreme Court, U. S.
FILED
OCT 7 1956
HAROLD B. WILLEY, Clerk

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1955

No. 231

BILL HATAHLEY ET AL.,

vs. *Petitioners,*

UNITED STATES OF AMERICA

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

BRIEF FOR THE PETITIONERS

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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1955

No. 231

BILL HATAHLEY ET AL.,

Petitioners,

vs.

UNITED STATES OF AMERICA

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

BRIEF FOR THE PETITIONERS

Opinions Below

The opinion of the court below (R. 428-438) is reported at 220 F. 2d 666. The oral opinion of the district court (R. 413-420) is not reported. The district court's findings of fact and conclusions of law appear at R. 18-48.

Jurisdiction

The judgment of the court of appeals (R. 438) was entered on March 1, 1955. A petition for rehearing was denied on April 15, 1955 (R. 439). The petition for writ of certiorari was filed on July 13, 1955 and granted on October 10,

1955 (R. 440). The jurisdiction of this Court rests on 28 U. S. C. § 1254(1).

Statutes and Regulations Involved

The pertinent provisions of the state and federal statutes and regulations involved are set out in the Appendix, *infra*, pp. 52-58.

Question Presented

The basic question, as presented in the Petition for Certiorari, is:

Whether agents of the Department of the Interior, purporting to act under the Utah "abandoned horse" statute, may confiscate and destroy livestock belonging to Navajo Indian wards of the United States, as a predetermined method of driving the Indians from their ancestral homes on the federal range, without liability to the Indians under the Tort Claims Act, 28 U. S. C. §§ 1346(b) and 2671 *et seq.*

For purposes of the present brief, this basic question may be subdivided, as follows:

1. Whether, in view of the enactment by Congress of the Taylor Grazing Act, there was any room for the operation of the Utah "abandoned horse" statute.

2. Whether, assuming the applicability of the Utah "abandoned horse" statute, there was compliance with its provisions so as to justify the confiscation and slaughter of the Indians' horses.

3. Whether, assuming compliance with the provisions of the Utah "abandoned horse" statute,

(a) the posting of written notices in English was sufficient as a matter of due process of law to affect illiterate non-English-speaking Indians; and

(b) there was a discrimination against the Indians in its application so palpable as to constitute a denial of equal protection of the laws.

4. Whether the award of damages was proper.

5. Whether the temporary injunction against further interference with the Indians by agents of the United States was properly issued.

Statement

Petitioners, Navajo Indians and wards of the United States, instituted the present action under the Federal Tort Claims Act to recover damages for the unlawful slaughter of their horses by agents of the United States. The authority of the agents to take the action complained of was admitted by the United States Attorney at the trial (R. 64).

The following facts were found by the district court (R. 18-41), after hearing voluminous testimony (R. 55-268, 282-413):

From time immemorial, petitioners and their families have lived in permanently constructed "hogans" upon an area of what is now public land of the United States in the southeastern corner of Utah. The Navajo Indians are herdsmen, and for many generations have continuously grazed horses and other livestock upon the land. (Fdgs. 1, 8, 17; R. 18, 24, 28.) In view of the limited resources of their country, the horse has become a vital part of these Indians' culture and economy, serving as beast of burden and as means of transportation, and, indeed, as a part of their religious life (Fdgs. 9-14; R. 24-27).

Following passage of the Taylor Grazing Act of June 28, 1934 (*infra*, pp. 52-53), the area used by petitioners was incorporated within Utah Grazing District No. 6 (Fdg. 3; R. 19-20). Permits to graze in that area were issued to white livestock operators (Fdg. 4; R. 20). Until 1946, the Navajos were not disturbed in their use of these lands for grazing purposes in common with non-Indians. However after the employment of a new federal Range Manager in that year, Kinnaman by name, respondent's agents commenced a deliberate and increasingly intensive campaign

of harassment and molestation to frighten the Navajos into surrendering possession of the area. Federal officers threatened the destruction of livestock and the imprisonment of individual Indians. They went so far as to seize and chain the wives of four of the petitioners—one with an infant in arms. On another occasion, they threatened to take small children from a Navajo widow, to put her in jail, and to destroy her livestock unless she left the country. She left immediately. (Fdgs. 17-20; R. 28-31; see also R. 163, 166-167, 170, 174, 301-302.)

In 1950, resorting to more regular procedure, the United States brought suit in the same court where the present action was later brought, to compel the removal from the range of the livestock owned by the present petitioners (R. 76). See *United States* v. *Hosteen Tse-Kesi*, 93 F. Supp. 745 (D. Utah; October 31, 1950). The district court's judgment of dismissal, on the ground that the proceeding would require the judiciary to perform duties vested by law in the Secretary of the Interior, was reversed (*United States* v. *Hosteen Tse-Kesi*, 191 F. 2d 518 (C. A. 10; August 30, 1951), and the case was reinstated for trial on the merits. Subsequently, following the destruction of petitioners' horses, of which complaint is made in the present case, the United States represented "that the defendants have returned to the Reservation and that there are no more trespassers," and the district court on June 27, 1953 dismissed the proceeding as moot (Fdg. 18 at R. 29).

At about the same time, local stockmen had instituted similar proceedings in the Utah state courts. See *Young* v. *Felornia*, Utah , 244 P. 2d 862 (May 21, 1952), certiorari denied, 344 U. S. 886 (November 17, 1952).

Kinnaman, the Department of the Interior's Range Manager, did not await the ultimate disposition of either of these lawsuits in the orderly course of judicial proceed-

ings. With full knowledge that the question of petitioners' right to graze their livestock was still before the U.S. District Court (R. 76-78), he initiated administrative steps, at his own instance (R. 90) and without reference to the Advisory Board (R. 93), looking to the destruction of the Indians' horses—and only the Indians' horses. The destruction of the horses continued after the present case was filed and while its trial was in progress (R. 82, 84).

The federal regulations promulgated pursuant to the Taylor Grazing Act that deal with livestock trespasses on public lands require that any "alleged violator * * * be served with a written notice * * *." 43 CFR 161.11(a), *infra*, p. 54; see Fdg. 5 at R. 21. No such notice was served in this case (R. 75-76, 414), although the Government agents knew to whom the horses belonged and could identify their brands, all of which were plain, and some of which were recorded under state law (Fdgs. 24, 28, 30; R. 34, 36-37; see also R. 154-157, 246, 252). Instead, Range Manager Kinnaman purported to invoke a state statute, commonly referred to as the Utah "abandoned horse" statute, which had been enacted in 1927, seven years prior to the date of the Taylor Grazing Act, (Fdg. 6, R. 22-24). During the period in controversy, this was Title 64, Chapter 2, Utah Code Annotated, 1943; it is now Title 47, Chapter 2 of the Utah Code Annotated, 1953; its relevant provisions are set forth *infra*, pp. 55-58.[1]

Under Section 1 of the Utah statute, *infra*, p. 55, an "abandoned horse" is defined as one that is "unbranded, or, if branded, that has escaped assessment for taxation for the year next preceding * * * running at large upon the open range of this state * * *. An animal not bearing

[1] As a matter of convenience, we cite the Utah statutes throughout this brief as they appear in the 1953 edition of the Utah Code Annotated. The substantive provisions in every instance are identical with those appearing in the 1943 edition.

a decipherable brand recorded in the office of the recorder of marks and brands shall be deemed unbranded." In providing a method of eliminating abandoned horses, so defined, from the range, the Utah statute (*infra*, pp. 56-57) calls for published and posted notices, authorized by the Board of County Commissioners concerned, to the effect that the elimination of such livestock would begin on a certain day.

On July 10, 1952, the first published notice of a program to eliminate "abandoned horses", purporting to emanate from the San Juan County Board of County Commissioners, was prepared by Kinnaman and delivered to the San Juan Record, a newspaper, where it was published (Fdg. 21, R. 31).

One of the contested issues in this case is whether that notice was published pursuant to a resolution stating that it was passed by the San Juan County Board of County Commissioners on July 9, 1952; for the text of the "resolution," see Fdg. 21, R. 32.

It is clear that the foregoing Board held its regular meetings on the first Tuesday of each month (R. 382), a date which in 1952 fell on July 1, August 5, and September 2.

There was a conflict of evidence as to whether the abandoned horse program was discussed at the Board's July 1 meeting. Two Commissioners testified that it was Kinnaman who broached the subject and requested the passage of an authorizing resolution (R. 363, 375, 383). They also testified that such a resolution was passed (R. 359, 375, 376, 383), and that Kinnaman and the County Attorney were directed to do the necessary drafting (R. 385). But the minutes of the July 1 meeting reflect no discussion of abandoned horses and do not contain any resolution on the subject (R. 150-151).

It was testified without contradiction that the Board did not meet on July 9 (R. 371, 383, 387), the date stated in the resolution. The record does not clearly establish just when the resolution was signed (R. 372, 387). One of the Commissioners signed it at his home (R. 387). It was also established that there were no special meetings of the San Juan Board of County Commissioners between July 1 and September 2, 1952 (R. 150, 387).

The first mention of abandoned horses in that Board's minutes appears in those of its September 2 meeting, which reflect a motion duly passed to insert therein the resolution dated July 9 (R. 148-149).

The district judge, after commenting on the witnesses' lack of frankness while they were testifying (R. 362, 368), thereafter formally expressed the opinion that they were not telling the truth concerning the adoption of the resolution (R. 414-416). He accordingly found that the resolution was not adopted prior to the September 2, 1952, meeting (R. 32, 42-43).

Apart from their participation in the foregoing adoption of a back-dated resolution, the Board of County Commissioners had nothing further to do with the plan of respondent's agents, Kinnaman et al., to eliminate petitioners' horses, either in authorizing the same or in carrying out the plan (Fdg. 21 at R. 32-33.)

The notice, above-mentioned, was in the English language, and was printed in the newspaper once a week for four weeks, from July 10 to August 8, 1952 (Fdg. 21 at R. 31-32). Kinnaman and another federal agent "had printed in the English language and then posted in the City of Monticello and at various places surrounding and within the area herein concerned no less than five of said notices which were in the same words as the notice printed in the San Juan Record newspaper" (Fdg. 21 at R. 33).

Petitioners, the district judge found, "speak only the Navajo language, which is an unwritten language" (Fdg. 15 at R. 27).

Beginning on September 20, 1952, and continuing until the present action was instituted on March 20, 1953 (R. 5), the respondent's agents captured and completely destroyed the Indians' horses (Fdg. 19, R. 29; R. 42-43, 54).

The animals were rounded up on the range and were either driven or hauled in trucks to a Government-owned or controlled corral 45 miles away. Horses which could not be so handled were shot and killed by the Government's agents on the spot. The remainder were accorded brutal treatment: the horses were so jammed together in the trucks that some died as a result, and in one instance, the leg of a horse that inconveniently protruded through the truck body was sawed off by a federal employee, one Dee P. Black. (Fdg. 23, 25; R. 33-35.) Later, the animals were taken in trucks to Provo, Utah, a distance of 350 miles, where they were sold to a glue factory and horse meat plant for about $1,700—at around 3 cents a pound (R. 93, 293)—no part of which was received by petitioners (Fdg. 24; R. 34).

Respondent's agents were engaged in the wholesale slaughter of Indian livestock, without regard to existing property rights, as part of a preconceived plan to drive these Indians from their homes by destroying their means of livelihood (R. 45, 47).

The district court specifically found that respondent's agents knew that the horses which they planned to and did kill belonged to petitioners (Fdgs. 28, 30; R. 36-37, 38). It was the Indians that these federal agents sought to remove (R. 45, 47). The government agents' concern was not with the Indians' 153 horses and burros (Fdg. 31; R. 39) on an area where permits had been issued for the grazing of 3,899 cattle and 33,818 sheep owned by white men (R. 410).

Consequently, respondent's agents did not intend to permit the redemption of any Navajo horses and granted petitioners no opportunity for redemption (Fdg. 24; R. 34). On one occasion, when one of the petitioners located his horses and asked permission to reclaim them, federal agent Dee P. Black asked payment of $60 per head, a sum Black knew the Indians could not pay (Fdg. 26, R. 35; see also R. 251, 261). In another instance, petitioner Hosteen Sakezzie and his family tracked their animals 35 miles to the Government corral, where Sakezzie requested Black to return his horses. During the conversation, one of the white stockmen left in his car and returned in a few minutes with several men armed with rifles, the loading mechanisms of which were worked before the Indians to convey to them the understanding that respondent's agents were prepared to shoot the Indians if they attempted to retake their horses. Sakezzie and his family became so frightened and intimidated by the threatening display of firearms that they departed peaceably and returned to their hogan without obtaining their horses. (Fdg. 27 at R. 36; see also R. 200-201, 212-214, 230-232.)

By contrast, five horses belonging to white men and unavoidably gathered with petitioners' horses were delivered by federal officers directly to the pastures or corrals of their owners, upon payment of a handling charge of only $2.50 per head (Fdg. 26, R. 35; see also R. 115-117).

The district court concluded that the provisions of the Utah "abandoned horse" statute on which the Government agents relied were not applicable, because Congress, by enactment of the Taylor Grazing Act, had undertaken complete regulation of grazing on the public domain; that the requirements of the Taylor Grazing Act and of the regulations thereunder respecting written notice, particularly 43 CFR § 161 (*infra*, p. 54), had not been complied with by respondent's agents; that, even if the Utah statute had

been applicable, its provisions concerning authorization from the Board of County Commissioners had not been followed or satisfied; and that, in any event, petitioners' horses were not abandoned within the meaning of the Utah statute. (R. 41-45, 413-417.)

In considering the amount of damages to be awarded, the district court took into consideration the unique position of the horse in the Navajo culture and economy, and the unique value to the present petitioners of the animals that respondent's agents had slaughtered (Fdgs. 8-16, 29; R. 24-28, 37-38). The district court further took into consideration the consequences, in terms of financial loss, visited upon these petitioners by the acts of federal officers in wantonly destroying the basic means by which they gained their livelihood and indeed maintained their way of life and their very existence (Fdgs. 31, 1-3; R. 39-41).

The court specifically found: The Navajo's horse is part of his way of life, specially trained and bred over many generations, essential to his spiritual and material well-being. Peculiarly adapted to the desolate country in which petitioners live, these horses can carry heavy burdens for up to three days without food or water. (Fdg. 15; R. 27.) They are used to till the dry land crops; they haul water, wood and supplies for great distances; they transport petitioners' families, the aged, and the sick (Fdg. 10; R. 25). Understanding only Navajo commands, the horse is the prized possession of the Navajo (Fdg. 15; R. 27). A horse is an inseparable part of Navajo family and religious life, the best horse being selected to ride with his dead master into the after world (Fdg. 14; R. 26-27).

For the wanton destruction of that unique asset, and for the consequential damage to which petitioners were subjected (Fdgs. 1-3; R. 39-41), the district court awarded judgment for $100,000 (R. 49-50). *Sua sponte* (see R. 417-418),

the district court also enjoined the respondent and respondent's agents from further molesting petitioners pending further action by the court (R. 48-49).

On appeal, the court below reversed the judgment of the district court and directed that the injunction be dissolved, with judgment to be entered for the United States (R. 438). The court based its decision on the applicability of the Utah "abandoned horse" statute (R. 435), and, disregarding the specific findings of the district court to the contrary (R. 32, 42-43, 414-416), held that the procedural provisions of the state law had been complied with in the slaughter of petitioners' animals, and that those animals were "abandoned" within the meaning of the state law (R. 435-438).

This Court granted certiorari (R. 440).

Summary of Argument

I. Here the provisions of federal law—the Taylor Grazing Act and the implementing regulations thereunder—are in direct conflict with the provisions of the Utah abandoned horse statute which the court below held to be justification for the destruction of petitioners' horses and burros.

The Taylor Grazing Act grants petitioners affirmative preference rights for grazing and absolute rights to graze animals for domestic use. The Utah abandoned horse statute confers no rights.

The Federal Range Code, adopted to implement the Taylor Grazing Act, requires that any alleged violator of the Act or of the Range Code be served with written notice, either in person or by registered mail. The Utah abandoned horse statute, however, provides only for notice by publication.

The reservation for state police power in Section 16 of the Taylor Grazing Act refers only to police power in the narrow sense, viz., state laws relating to health and welfare.

That provision did not leave any scope for the operation of state laws in actual conflict with the federal scheme for regulating grazing on the federal range.

Moreover, the Government agents here were not authorized to invoke the Utah abandoned horse statute. The Taylor Grazing Act does not expressly empower Government agents to rely on state enforcement machinery, and its self-executing penalty provision would appear to negative any such reliance. So much of the Federal Range Code as purports to authorize invocation of "local impoundment law and procedure" is therefore *ultra vires*. In any event, the Utah abandoned horse statute is not an impoundment law. It is a measure dealing with nuisances; the Utah impoundment act, an entirely different statute, far from authorizing what was done here, declares the round-up which was actually involved here to constitute a misdemeanor.

II. But even if the Utah abandoned horse statute were held to be applicable, its provisions were not followed, and so could not justify the torts committed here.

Statutes imposing penalties and forfeitures are always strictly construed, and the same is true of statutes providing for summary proceedings, where literal and exact compliance is required. The fundamental error of the court below was that it construed the Utah abandoned horse statute broadly and was satisfied with only colorable compliance therewith.

There was in fact no compliance with the Utah abandoned horse statute. The Board of County Commissioners did not authorize the round-up program until after the publication of the notices had been completed. The pretended and predated resolution that purported to authorize the round-up was never validly adopted before then.

Moreover, petitioners' horses were not abandoned within the meaning of the Utah statute, first, because they were

duly branded with recorded brands, and second because in fact they were not abandoned. Here the Government agents knew that the horses they rounded up and destroyed belonged to these petitioners.

III. Even on the assumption, *arguendo*, that there was compliance, the application of the Utah abandoned horse statute to petitioners involved a denial of constitutional protections.

The notice given petitioners was so inadequate as to deprive them of due process of law. They were illiterate Indians, speaking only the unwritten Navajo tongue, whereas the notices were in English, posted on the range and published in a newspaper. The means employed could not have been more carefully devised to withhold information from those who were to be affected by the notice. Moreover, the Government agents knew that it was these petitioners' animals that they sought to round up. Thus they were in a position to give personal notice on this occasion, as they had done in the past.

More than that, both in the administration of the Taylor Grazing Act as well as in the Government agents' administration of the Utah abandoned horse statute, there was discrimination against these Indian petitioners and in favor of white stockmen so palpable as to amount on this record to a denial of equal protection of the laws.

IV. The district court's award of damages was based on specific findings as to the unique value of the Indians' animals and as to the consequential damages suffered by reason of the depredations here complained of. Those findings are supported by evidence. The consequential damages reflected in the judgment were proper as a matter of Utah law, and were not foreclosed by anything in the Federal Tort Claims Act. The judgment was proper under Rule 20(a), F. R. Civ. P., and, to the extent that individual peti-

tioners might have insisted on separate judgments, such objection has been waived.

V. The district court properly enjoined the Government's agents from further molesting petitioners. After the depredations here complained of had succeeded in driving petitioners from their homes, Government counsel obtained dismissal of a pending suit to adjudicate petitioners' rights to the area here in question on the basis that it had become moot. Those who initiated the destruction of petitioners' horses were aware at that time of the pendency of that suit, and moreover were still carrying out such destruction when the present action was on trial. In addition, the Government's agents were turning over to white stockmen land that some of the petitioners had been occupying. In those circumstances, the injunction was proper under familiar equitable principles.

Petitioners concede that the injunction should be modified so that it will not run against the United States *eo nomine*.

Argument

I. THE INDIANS' RIGHTS UNDER THE TAYLOR GRAZING ACT COULD NOT BE AFFECTED BY THE UTAH ABANDONED HORSE STATUTE.

As has been shown, agents of the United States purporting to act under color of a state statute, wantonly destroyed some 150 horses and burros belonging to petitioners, and the court below, reversing a judgment in their favor for damages, has held that such destruction was lawful, on the ground, *inter alia*, that the state statute—the so-called Utah abandoned horse law—remained in full effect notwithstanding the subsequent enactment of the Taylor Grazing Act.

This Court has frequently divided on the question whether Congress has so preempted a particular field that all state laws dealing with the same subject matter are rendered

inoperative, even in the absence of a direct conflict, or in a situation where federal authority under the federal statute had not been exerted. E. g., *Hines* v. *Davidowitz*, 312 U. S. 52; *Bethlehem Steel Co.* v. *New York State Labor Board*, 330 U. S. 767.

But it has never been doubted, not even by the court below in this case (R. 435), that where there is a direct conflict between the provisions of the state and federal laws that deal with the identical subject matter, the state law cannot be given effect.

We shall show that there was such a conflict, in two material respects.

A. *The Taylor Grazing Act Gave the Present Petitioners Affirmative Rights With Respect to the Grazing of Their Horses and Burros That Were Not Contained in the Utah Abandoned Horse Statute*

A reading of the Taylor Grazing Act shows that petitioners were entitled to graze their horses and burros on the land from which those animals were taken by federal agents.

Section 3 of that Act (43 U. S. C. § 315b; *infra*, p. 52) authorized the Secretary of the Interior to issue grazing permits to "bona fide settlers, residents, and other stock owners", and directed that preference in the issuance of such permits be given "to those within or near a district who are * * * bona fide occupants or settlers * * * as may be necessary to permit the proper use of lands * * * occupied * * * by them * * *."

The findings here (Fdgs. 1, 8, 17; R. 18, 24, 28) make it crystal clear that petitioners had occupied the lands from which their horses were taken since time immemorial.

Next, Section 5 of the Taylor Grazing Act (43 U. S. C. § 315d; *infra*, p. 53) directs the Secretary to permit "the

free grazing within such districts of livestock kept for domestic purposes." The implementing regulation is 43 CFR 161.6 (*infra*, p. 53).

The findings show that the horses and burros for which petitioners seek compensation here were in fact domestic animals (Fdgs. 8-10, 12-14; R. 24-25, 26-27).

Thus there was a sharp and diametrical conflict between state and federal law so far as the quantum of petitioners' grazing rights were concerned. The state law gave them nothing, whereas the federal law gave them affirmative preference grazing rights for their livestock and absolute grazing rights for all stock used for domestic purposes.

The federal officials should therefore have accorded petitioners the grazing rights Congress intended them to have, and should not have rounded up their horses and burros to be sold for glue.

B. *The Taylor Grazing Act and the Regulations Thereunder Provided for Personal Notice to Trespassers on the Federal Range, Whereas the Utah Abandoned Horse Statute Provided Only for Notice by Publication*

But even if it be assumed, contrary to the plain provisions of the Act of Congress, that petitioners' horses and burros were not lawfully on the public range, still these animals were not dealt with in accordance with the Taylor Grazing Act and its implementing regulations.

Section 2 of the Act (43 U. S. C. § 315a; *infra*, p. 52) authorized the Secretary of the Interior to make rules and regulations to accomplish the purposes of the legislation. Acting under that authority, the Secretary promulgated the Federal Range Code (43 CFR 161.1 *et seq.*), which made provision, *inter alia*, for the service of written notice to any alleged willful violator of the Act or of the Range Code.

See 43 CFR 161.11; *infra*, p. 54. Such notice is required to be served in person or by registered mail (Sec. 161.11(a)), and, where the charge consists of unlawful grazing on the Federal range, the alleged violator will be ordered to remove the livestock within a reasonable time (Sec. 161.11(b)). Only if the violator fails to comply with the notice is the federal official authorized "to exercise the proprietary rights of the United States in the Federal range, under local impoundment law and procedure, if practicable", otherwise he is to invoke appropriate legal action by the United States (*ibid*).

There was no compliance with the notice provisions of the Federal Range Code on the part of the Government's agents (Fdgs. 21-28; R. 31-37; Conc. 3, R. 44-45). No notice was served (*ibid.*; R. 75-76). And the Utah abandoned horse statute, held by the court below to justify destruction of petitioners' animals, did not give petitioners the protection of the personally directed written notice required by the Federal Range Code, as it provides only for notice by publication.

In every respect material here, therefore, the provisions of federal and of state law are in conflict.

In those circumstances, can there then be any basis for supporting the holding below (R. 435) that the state law was applicable on the federal range? We turn to that question.

C. *The Reservation for State Police Power in the Taylor Grazing Act Did Not Permit the Utah Abandoned Horse Statute to Operate in the Very Sphere That Congress Was Regulating, viz., Grazing on the Public Domain*

The court below relied on Section 16 of the Taylor Grazing Act (43 U. S. C. § 315n; *infra*, p. 53), which is as follows:

> "Nothing in this Act shall be construed as restricting the respective States from enforcing any and all statutes enacted for police regulation, nor shall the police power of the respective States be, by this Act, impaired or restricted, and all laws heretofore enacted by the respective States or any thereof, or that may hereafter be enacted as regards public health or public welfare, shall at all times be in full force and effect: *Provided, however,* That nothing in this section shall be construed as limiting or restricting the power and authority of the United States."

Section 16 was not in the Taylor Grazing Act as introduced or as it passed the House. That portion thereof preceding the proviso was offered as an amendment on the Senate floor by Senator McCarran. 78 Cong. Rec. 11162. He offered no explanation; none was asked; and his amendment was adopted without a word of discussion.

The proviso was then added in conference. H. R. Rep. 2050, 73d Cong., 2d sess., pp. 2-3; 78 Cong. Rec. 12004; 78 *id.* 12167. The House managers explained their action as follows (H. R. Rep. 2050, *supra*, at p. 4; 78 Cong. Rec. at 12168):

> "Cannot invade Federal jurisdiction or authority, thus leaving the State laws in full operation."

It would be difficult, as an original proposition, to devise a more meaningless bit of equivocal self-contradiction.

Insofar as the body of Section 16 and its proviso, read together, have any meaning at all, they would seem in juxtaposition to be merely declaratory of existing law, namely, that state laws relating to health and welfare remain in effect, but that state laws dealing with the very subject-matter of the Taylor Act, viz., regulation of grazing, are necessarily inoperative.

This indeed was the result reached in the only other similar case arising under the Taylor Grazing Act, and it was a result foreshadowed by the generally recognized principles formulated in other cases involving apparent conflicts between state and federal legislation.

In *Noh* v. *Babcock*, 21 F. Supp. 519 (D. Idaho), Judge Cavanah held that Section 16 of the Taylor Act did not leave operative an Idaho statute purporting to regulate grazing.[2] He said (21 F. Supp. at 522):

> "* * * [a citizen] is only subject to the enforcement of the police power of the state where circumstances arise as to the conduct of those bordering on breaches of the peace and the avoidance of physical conflicts between cattle and sheep owners in case of invasion of cattle ranges by sheep herders, and in the protection of the health or public welfare. * * * The provision in the Taylor Grazing Act that it shall not be construed as restricting the state from enforcing its statute enacted for police regulation or regarding public health or public welfare cannot under the facts in the present case be applied or extended to the use of the federal public range, where Congress has exercised its power under the Constitution, but only in the instance above stated and when not in conflict with the Federal Constitution or statutes."

And he issued an injunction to restrain a prosecution under the Idaho statute, an injunction which was reversed on the sole ground that it related to a pending rather than only to a threatened prosecution. *Babcock* v. *Noh*, 99 F. 2d 738 (C.C.A. 9).

On the substantive issue, Judge Cavanah was clearly

[2] The same statute had been sustained in *Omacchevarria* v. *Idaho*, 246 U. S. 343, prior to the enactment of the Taylor Grazing Act and in the absence of federal range legislation.

right, for it has long been settled that, when Congress undertakes a regulatory scheme within its constitutional powers, such action renders inoperative state regulation in the same field, leaving to the State only such police powers as directly affect health, welfare and safety. *Northern Pac. Ry. Co.* v. *North Dakota*, 250 U. S. 135; *Dakota Cent. Tel. Co.* v. *South Dakota*, 250 U. S. 163.

In the *Northern Pacific* case, just cited, the question was whether the Director-General of Railroads, after the wartime seizure of all rail transportation in 1917, had power to fix rates on intrastate commerce higher than those fixed by North Dakota, in view of Section 15 of the Act for the operation of the railroads under federal control (250 U. S. at 146; n. 1), "That nothing in this act shall be construed to amend, repeal, impair, or affect existing laws or powers of the state in relation to taxation or to the lawful police regulations of the several states, except wherein such laws, powers, or regulations may affect the transportation of troops, war materials, government supplies, or the issue of stocks and bonds." This Court held that the quoted provision could not be interpreted to limit the comprehensive rate-making power vested by the Act in the Federal Government.

Again, in the *Dakota Central Telephone Co.* case, the question was whether South Dakota retained power to fix intrastate telephone rates after the 1918 wartime seizure of all telephone systems, in view of a proviso in the Joint Resolution authorizing the seizure (250 U. S. at 182) "That nothing in this act shall be construed to amend, repeal, impair, or affect existing laws or powers of the states in relation to taxation or the lawful police regulations of the several states, except wherein such laws, powers, or regulations may affect the transmission of government communications, or the issue of stocks and bonds by such system or systems." Again, this Court held that there

was no room for the operation of state powers in the rate-making field.

Chief Justice White pointed out (250 U. S. at 185-186),

> "It was conceded that the words 'police power' were susceptible of two significations, a comprehensive one embracing in substance the whole field of state authority, and the other a narrower one, including only state power to deal with the health, safety, and morals of the people."

And the Chief Justice went on to say that the narrower construction was necessary to prevent the anomaly resulting from a continuance of state power in a situation where Congress had assumed full control.

In the present case, the specific use in Section 16 of the Taylor Grazing Act of the words "public health or public welfare" is persuasive evidence that the narrower meaning of "police power" was intended.

The court below said (R. 435), "We find nothing in the Taylor Grazing Act that suggests an intent to suspend local law which is not in conflict with the provisions of the Act or the regulations promulgated thereunder." But the court below never considered the conflict already outlined above, and in particular it ignored the obvious difference between the requirements for notice: The Federal Range Code requires personal notice, the Utah statute is satisfied by publication.

It is no answer to suggest, as the Government now does (Br. Op. 8), that compliance with the written notice provision of the federal regulations "would render elimination from the federal range of abandoned animals difficult if not impossible as a practical matter." The present record shows that the Government's agents served personal notices under the federal regulations in the past without apparent difficulty (R. 132).

But the heart of the matter is that the notice provisions of the federal regulations are in irreconcilable conflict with the notice provisions of the state statute. That circumstance would be sufficient, standing alone, to demonstrate conclusively that, after the enactment of the Taylor Grazing Act and the promulgation of regulations thereunder, the operation of the Utah abandoned horse statute was suspended on the federal range.

Without prolonging the discussion, it is evident from the conflicts which have been pointed out that Congress did not intend to render nugatory its scheme of federal grazing regulations by permitting untrammelled play for overlapping and conflicting state legislation.

D. *The Government's agents were not authorized to invoke the Utah abandoned horse statute*

Additionally, it is clear that the Government agents in this case were not authorized even to invoke the Utah abandoned horse statute, much less to act as agents of the County Commissioners in executing it.

To begin with, there is nothing in the Taylor Grazing Act that empowers the Secretary of the Interior or any of his subordinates to rely on state enforcement machinery of any kind in the administration of that measure, and indeed Section 2 thereof (43 U. S. C. § 315; *infra*, p. 52), which contains a self-executing penalty provision, would appear to negative any such reliance. To the extent, therefore, that 43 CFR 161.11(b) (*infra*, p. 54) purports to authorize the range manager to invoke "local impoundment law and procedure," it is probably *ultra vires* the statute.

But a contrary assumption does not help the Government, for the Utah abandoned horse statute is not an impoundment law.

Impoundment under the Utah Code is regulated by Chap-

ter 12 of Title 4, U. C. A. 1953, entitled "Estrays and Trespassing Animals." That is the local impoundment law, which expressly declares that what the federal agents did here was a misdemeanor. Sec. 4-12-24 (*infra*, p. 55) provides that

> "Any person, other than the owner or his agent, who drives any horses, mules, * * * from their usual or customary ranges * * * farther than to the nearest or most convenient corral and neglects to return such horses, mules * * * immediately to their accustomed range or place from which they were driven is guilty of a misdemeanor."

To the extent, therefore, that the federal agents in this case could lawfully rely on state law, they committed not only a tort but a crime as well. For on that assumption, they were restricted to the "local impoundment law and procedure"—which does not include the Utah abandoned horse statute. The latter is classified in Title 47, U. C. A. 1953 under "Nuisances"—along with a chapter dealing with brothels.[3]

There was, therefore, no authority to proceed under the abandoned horse provisions. And insofar as the Government now urges (Br. Op. 8-9) that the abandoned horse law had already been repeatedly invoked, even after the enactment of the Taylor Grazing Act, the conclusive answer is that "Illegality cannot attain legitimacy through practice." *Inland Waterways Corp. v. Young*, 309 U. S. 517, 524.

The short of the present case is that the Government relies for justification on the state abandoned horse statute which, after the enactment of the Taylor Grazing Act, had become inoperative on the federal range. Such reliance,

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[3] Both chapters are similarly combined in Title 64, U.C.A. 1943.

as the District Court held (Conc. 1, R. 41-42), does not justify the torts committed by its agents here.

II. EVEN IF THE UTAH ABANDONED HORSE STATUTE WERE APPLICABLE, ITS PROVISIONS WERE NOT FOLLOWED, AND ACCORDINGLY IT COULD NOT JUSTIFY THE SLAUGHTER OF THE INDIANS' HORSES FOR WHICH COMPENSATION IS SOUGHT HERE.

In this case, the district court held that the provisions of the Utah abandoned horse statute had not been complied with (Conc. 2; R. 42-44; R. 414-416), while the court of appeals held to the contrary (R. 435-438).

It seems significant to us, by way of preliminary, that the ruling that there had been no compliance with the Utah statute was rendered by the District Judge for the District of Utah, while that to the contrary was reached by three judges none of whom had any peculiar competence in Utah law; Judge Pickett, who wrote the opinion, is from Wyoming, while Judges Murrah and Savage, who concurred, are both Oklahomans. Thus there is applicable the rule, repeatedly enunciated by this Court, that since the district judge was from the Utah bar, his statement of what the Utah law is carries special weight. *Bernhardt* v. *Polygraphic Co.*, No. 49, Oct. T. 1955, decided January 16, 1956, pp. 6-7 of slip opinion, and cases there cited.

A. *Statutes such as the one here in question are to be strictly construed.*

The district judge held that the Utah statute, which provided for summary proceedings, must be strictly construed (R. 413-414, 416), while the court of appeals interpreted the act broadly.

The approach of the court of appeals in this respect constituted fundamental error. For, just as penal statutes are to be construed strictly (e.g., *FCC* v. *American Broad-*

casting Co., 347 U. S. 284, 296) and construction of a statute that avoids confiscation on a fair reading is invited (*Guessefeldt* v. *McGrath*, 342 U. S. 308), so statutes imposing a statutory penalty are likewise to be read strictly (*Tiffany* v. *Bank of Missouri*, 18 Wall. 409, 410), and "acts, imposing forfeitures, are always construed strictly against the government, and liberally as to the other parties" (*Shipp* v. *Miller's Heirs*, 2 Wheat. 316, 325, *per* Story, J.; *Farmers' and Mechanics' Nat. Bank* v. *Dearing*, 91 U. S. 29, 35).

Utah law is to the same effect. "It is true that it is the duty of courts to enforce the plain intent of the statute when the parties entitled to the benefit of the statute ask for its protection. Courts do not, however, and ought not, so interpret a legislative act that the property of one citizen is forfeited and lost to another, unless the plain and unequivocal mandate of the Legislature admits of no other rational construction." *Rospigliosi* v. *Glenallen Mining Co.*, 69 Utah 41, 51, 252 Pac. 276, 279; *Seaboard Finance Co.* v. *Wahlen*, 260 P. 2d 556, 561 (Utah 1953).

The district judge, in his oral opinion, said with reference to the Utah statute (R. 413-414, 416):

> "Now, that Section 161.11, together with the abandoned horse program in the provisions of the Utah statute to which you refer are summary proceedings. They are harsh and they are drastic. Those sections contemplate that official action be taken without an opportunity to hold a hearing and to have the matter judicially determined. Now, the law about that kind of a proceeding is that you have to follow the statute or the regulation strictly. As I said a bit ago, you have got to cross the t's and dot the i's. If you don't with exactness follow the letter of the statute or the regulation your action is void, without validity; illegal. * * *

"Now, you can't play fast and loose with those things. You must follow that statute and you must follow that regulation with particularity. . . .

"At any rate there are no presumptions of legality when it comes to the abandoned horse statute in this State, because that statute provides for harsh and drastic summary action. Every one of the requirements must be followed with particularity. The only thing that satisfies the statute is strict compliance."

The foregoing statement of the law as to statutes authorizing summary proceedings is in strict accord with all of the authorities. *Ex parte Buckley*, 53 Ala. 42, 56; *Souter* v. *The Sea Witch*, 1 Calif. 162; *Stidham* v. *Brooks*, 40 Del. 110, 120, 5 A. 2d 522, 526; *Village of Lovington* v. *Gregory*, 287 Ill. 169, 175, 122 N. E. 504, 506; *Karahalios* v. *Dukais*, 108 Me. 527, 530, 81 Atl. 1011, 1012; cf. *Corporation of Washington* v. *Pratt*, 8 Wheat. 681, 683. And this Court has had occasion to emphasize the necessity of strict compliance where a statute authorizes notice by publication. *Guaranty Trust &c. Co.* v. *Green Cove Springs R. Co.*, 139 U. S. 137, 148.

Tested by these undoubted general principles and by the specific provisions of the Utah statute under consideration, the court below was wrong, and the district court right, in their rulings as to whether the provisions of Utah law were complied with by the Government agents who wantonly destroyed petitioners' horses.

B. *The procedure followed by the County Commissioners of San Juan County was insufficient as a matter of Utah law to justify the seizure and slaughter of petitioners' animals.*

The findings in this case show very explicitly that Kinnaman, the federal Range Manager, approached the Board of

Commissioners with respect to a round-up of petitioners' horses under the Utah abandoned horse statute; that he then prepared and delivered a "Notice of Elimination of Abandoned Horses", dated July 10, 1952, for publication in a local newspaper; and that the notice was published once a week for four weeks from July 10 through August 8, and was thereafter posted in and around Monticello (Fdg. 21, R. 31-32).

The evidence shows that the minutes of the regular meetings of the Board of Commissioners for July 1 and August 5 are silent as to any discussion of abandoned horses and do not contain any resolution authorizing a round-up; that there were no special meetings during that period; that the purported authorizing resolution, dated July 9, was not adopted at any meeting held on that day, but was separately signed by the Commissioners at various places; and that this resolution was thereafter inserted in the minutes of the regular September 2 meeting, after publication of the notices thereunder had been completed. See references *supra*, pp. 5-7.

The district court found as a fact, after hearing the evasive (R. 362, 368, 414-416) and conflicting (R. 358-378, 375-376, 382-390) testimony of the Government's witnesses, that there was no board action to adopt this resolution prior to September 2 (R. 32, 42-43, 414-416).

The court of appeals ignored the trial judge's findings on this contested issue. It simply concluded (R. 436), "The procedure of the Commissioners may not measure up to the strictest parliamentary practice, but the record discloses that positive action was taken by the Board in a regular meeting. The fact that the Board later sought to complete its minutes by inserting a resolution therein would not affect the validity of its previous action." And the Government airily disposes of the issue by the comment (Br. Op.

10), "A question as to the date of a formal resolution is immaterial."

Examination of Utah statutes and decisions shows that the palpable perversion of the processes of orderly government which is disclosed by the present record cannot be so lightly disposed of, and that the district judge was correct in finding non-compliance with Utah law (Conc. 2; R. 42-44).

First. The record shows without contradiction that the Board of County Commissioners of San Juan County held their regular meetings on the first Tuesday of each month (R. 382). The first Tuesday in July 1952 was July 1. It is not contended the minutes show that any action with reference to abandoned horses was taken on that day.

The resolution purporting to authorize the institution of the abandoned horse program is dated July 9, 1952 (R. 32). The record shows that no board action was taken at that time (R. 31-32), and that this resolution was signed separately by the Commissioners (R. 387, 415). The district judge said (R. 415),

> "Now, that isn't an official action of the Board of County Commissioners when they signed that thing out there. It wasn't done in the regularly called meeting of the County Commissioners. That isn't a resolution of the Board of County Commissioners."

Nor can the July 9 "resolution" be given effect as having been passed at a special meeting. No formal special meeting was called between July 1 and September 2 (R. 150, 387). The Board did not meet on July 9 (R. 371, 383, 387). Moreover, the Utah statutes (U. C. A. 1953, Sec. 17-5-7; *infra*, p. 55) make very specific provision for the calling of special meetings of boards of county commissioners. The call must be signed and entered in the minutes, it must specify the business to be transacted at such special meeting, and five

days' notice must be given to all members not joining in the order.

That such safeguards against informal action are not lightly to be disregarded in Utah is attested by the circumstance that a similar provision, now U. C. A. 1953, Sec. 17-15-1, requiring that every ordinance adopted by a board of county commissioners be signed by the members voting for or against, was held to be mandatory, and to render an unsigned ordinance void. *Summit County* v. *Gustaveson*, 18 Utah 351, 54 Pac. 977. And the general rule in Utah is that acts of a county board not in accord with statute are void. *Auerbach* v. *Salt Lake County*, 23 Utah 103, 63 Pac. 907.

Moreover, the law is well settled that a board of county commissioners must act as a body and that actions taken by the commissioners as individuals are of no validity. *Rockingham County* v. *Luten Bridge Co.*, 35 F. 2d 301, 304-305 (C. C. A. 4), quoting with approval what was said in *Paola, etc. R. Co.* v. *Anderson County Com'rs*, 16 Kan. 302, 310: "Commissioners casually meeting have no power to act for the county. There must be a session of the 'board'. This single entity, the 'board', alone can by its action bind the county. And it exists only when legally convened." And see, for collections of cases to the same effect, 1 McQuillin, *Municipal Corporations* (3d ed. 1949) § 1.88 at pp. 316-317; 14 Am. Jur. 204, Counties § 32; 20 C. J. S. 855 *et seq.*, Counties, §§ 87, 88a.

It is therefore plain that, prior to the insertion of the purported July 9 resolution in the minutes of the September 2 meeting, there was no official county action. We are therefore faced with the question whether any formal resolution was required by the statute—the court of appeals thought not (R. 436)—or whether, in any event, as the Government now contends (Br. Op. 10), there was an effective ratification of the program.

Second. The Utah statute (U. C. A. 1953, Sec. 47-2-4; *infra*, p. 56) provides:

> "The boards of county commissioners may provide for the elimination of abandoned horses in the respective counties in the following manner:
>
> "*They shall cause notice to be published* at least once a week for three successive weeks in some newspaper * * *" [Italics supplied.]

The statute clearly requires action by the county board, viz., "they shall cause notice to be published." Perhaps the statute does not specifically require any formal resolution, but formal board action is still necessary, and both Kinnaman and the Commissioners evidently thought that a resolution was required, because the one made request therefor, and the others complied. And the Board on previous occasions had passed resolutions prior to invoking the Utah abandoned horse statute (R. 386).

In any event, the Board of County Commissioners in July did not cause any notice to be published. Only Kinnaman caused a notice to be published. There was no valid board action prior to September 2, and by that time the notices had all been published. Such action did not comply with the statute, and there is no room for the doctrine of relation back in these circumstances. Action taken by county commissioners not in strict accordance with statute is void (*Summit County* v. *Gustaveson*, 18 Utah 351, *supra*), acts imposing forfeitures are construed strictly in favor of the individual (*Shipp* v. *Millers' Heirs*, 2 Wheat. 316; *Farmers' and Mechanics' Nat. Bank* v. *Dearing*, 91 U. S. 29), and statutes authorizing summary proceedings must be strictly followed (*supra*, pp. 25-26).

Thus, on examination, it is seen that the court of appeals' holding that the provisions of the Utah abandoned horse

statute were complied with not only ignores governing general principles, but settled Utah law as well.

C. *Petitioners' horses were in any event not abandoned within the meaning of the Utah abandoned horse statute*

The following definition of abandoned horses is contained in the Utah statute (U. C. A. 1953, Sec. 47-2-1; *infra*, p. 55):

> "The term 'abandoned horse' as used in this chapter means any horse, ass, mule or other animal of the genus equus, unbranded, or, if branded, that has escaped assessment for taxation for the year next preceding the killing of such animal as hereinafter provided for, and running at large upon the open range of this state, and includes a foal running with a dam coming within the above definition. An animal not bearing a decipherable brand recorded in the office of the recorder of marks and brands shall be deemed unbranded."

The district judge found and concluded *inter alia* as follows:

> "* * * That said agents knew beyond any possible doubt to whom said horses belonged; that said agents knew at all times that the horses involved in this action belonged to plaintiffs or to some of them." (Fdg. 27; R. 36.)
>
> "The horses of plaintiffs were plainly branded, and some of the brands thereon were duly recorded in accordance with State law; the said agents and employees of defendant knew these brands to be the brands used by plaintiffs as well as they knew that the horses belonged to plaintiffs." (Fdg. 30; R. 38.)
>
> "The provisions of this State statute could not apply

here for the further reason that the horses involved were not 'abandoned' as contemplated by the statute. They were everything but abandoned. They were used daily in the performance of the work of their owners, the plaintiffs, and this was well known by defendant's said agents and employees. The horses were not unbranded, but they were branded and with brands recorded and decipherable." (Conc. 2; R. 43-44.)

The court of appeals did not question the findings above quoted, but assumed, in disregard of them, that petitioners' horses were within the statute, and went on to say (R. 437) that "The dictionary definition of the term 'abandoned' has no application."

The Government makes no attempt to support the court of appeals' construction of the statute, but simply says, citing record references (Br. Op. 8), that "Petitioners offered no records to sustain their assertion that the animals bore recorded brands. A search of the records by government employees showed that no brands were registered."

So far as the issue of recorded brands was concerned, obviously the recording books or certified extracts therefrom were the best evidence. 4 Wigmore, *Evidence* (3d ed. 1940) §§ 1173-1174, 1177-1282. Neither side produced such evidence. Instead, both sides relied on oral evidence, which, though inadmissible, was not objected to. Petitioners' witnesses testified that their brands *were* recorded (R. 201, 246, 258), the Government's witnesses testified to the contrary (R. 147, 292-298, 309-310, 333). The trial judge resolved this conflict of oral evidence in petitioners' favor (Fdg. 30, R. 38; Conc. 2, R. 43-46). Since he saw and heard the witnesses, his finding is obviously not "clearly erroneous" (Rule 52(a), F. R. Civ. P.) and so must stand, particularly in view of his repeated observations concerning

the poor veracity of the principal Government witnesses (R. 104, 108-109, 160).

On this footing, petitioners' horses were not within the statute.

But even if some of them were (cf. Pdg. 30, R. 38, with Conc. 2, R. 43-46), there is still no warrant for the court of appeals' cavalier assumption (R. 437) that "The dictionary definition of the term 'abandoned' has no application." For, after all, the Utah abandoned horse law is a summary statute, which even the court of appeals deemed "harsh" (R. 438); can it be supposed for a moment that the canon requiring strict construction of such legislation (*supra*, pp. 25-26) will permit any persons purporting to exert governmental power to treat as abandoned, horses that were in fact not abandoned and whose ownership was known to such officers? We think not. For to apply the harsh procedure of the Utah law in these circumstances would be, not to abate a nuisance, which is what Utah has declared abandoned horses to be (*supra*, p. 23), but to attempt to cloak with an aura of colorable legality what the trial judge after hearing the testimony characterized as "just a cold-blooded depredation" (R. 226).

The court of appeals said (R. 437-438), "The actual knowledge of the ownership of the abandoned animals by the County Commissioners or those in charge of the elimination program in their behalf is not material, and the Utah statute is clear on the subject." No authority was cited for that proposition, and none, we believe, is available. The rule of strict construction (*supra*, pp. 25-26) points in precisely the opposite direction.

III. EVEN IF THE PROVISIONS OF THE UTAH ABANDONED HORSE STATUTE SHOULD BE HELD TO HAVE BEEN COMPLIED WITH TO THE LETTER, ITS APPLICATION TO THESE PETITIONERS INVOLVED A DENIAL OF CONSTITUTIONAL PROTECTIONS.

Under this heading we assume, but only for purposes of argument, that the provisions of the Utah abandoned horse statute were fully complied with, and, on that assumption, go on to show that even full compliance therewith involved a denial of constitutional protections to these petitioners. First, the notice prescribed by the Utah statute was so inadequate as to amount to a deprivation of due process; second, the statute was applied so as to discriminate against the Indian petitioners in such a way as to deny them the equal protection of the laws.

A. *Publication and posting of notices in English where illiterate and non-English speaking Indians are sought to be affected is so patently inadequate as to involve a denial of due process of law.*

The court below overlooked a fatal defect in the procedure adopted by the Government agents who killed petitioners' horses: No adequate notice was given them as warning of the catastrophic loss that impended.

The district judge made an explicit finding (Fdg. 15, R. 27) that "Plaintiffs speak only the Navajo language, which is an unwritten language * * *." The district judge made a further finding (Finding 21, R. 31-33) that the notice inserted by Kimmaman in purported conformity to the Utah statute was in English, was published in the San Juan Record once a week for four weeks, and that five such notices were posted in the City of Monticello "and at various places surrounding and within the area herein concerned * * *." Finally, the district judge made specific findings (Fdgs. 27, 28; R. 36) "That said agents

knew beyond any possible doubt to whom said horses belonged; that said agents knew at all times that the horses involved in this action belonged to plaintiffs or to some of them [;] That defendant's agents and employees * * * knew, at all times herein concerned, to whom the horses belonged which they planned to and did kill * * *."

'We think that from those findings—which were not disturbed by the court below—it follows that the seizure and destruction of petitioners' horses entailed an application of state law that deprived petitioners of due process of law, in that the notice given them was patently inadequate.

For this proposition it is only necessary to cite a recent decision of this Court, *Mullane* v. *Central Hanover Bank & Trust Co.*, 339 U. S. 306, which held incompatible with the Fourteenth Amendment a notice by publication designed to serve as a basis for conclusively adjudicating the property rights of known persons whose whereabouts were known.

As the Court there said (339 U. S. at 315),

> "But when notice is a person's due, process which is a mere gesture is not due process. The means employed must be such as one desirous of actually informing the absentee might reasonably adopt to accomplish it."

It would be difficult to imagine a method less calculated to convey information to illiterate Navajos than the posting of notices in English, or the publication of such notices in a newspaper which they would be unable to read if they wished to do so. Certainly the San Juan Record was not a newspaper generally circulating among these petitioners.

What was said in the *Mullane* case as to the inadequacies of notice by publication generally warrants repetition here (339 U. S. at 315):

"It would be idle to pretend that publication alone as prescribed here, is a reliable means of acquainting interested parties of the fact that their rights are before the courts. It is not an accident that the greatest number of cases reaching this Court on the question of adequacy of notice have been concerned with actions founded on process constructively served through local newspapers. Chance alone brings to the attention of even a local resident an advertisement in small type inserted in the back pages of a newspaper, and if he makes his home outside the area of the newspaper's normal circulation the odds that the information will never reach him are large indeed. The chance of actual notice is further reduced when as here the notice required does not even name those whose attention it is supposed to attract, and does not inform acquaintances who might call it to attention. In weighing its sufficiency on the basis of equivalence with actual notice we are unable to regard this as more than a feint."

That being true of a notice addressed to literate persons having knowledge of the language, can it be contended for a moment that a notice published in English is to be regarded as sufficient to charge illiterate Indians conversant only with the unwritten Navajo tongue? To ask that question is to answer it.

Here, moreover, as the district judge found, the Government agents publishing and posting the notice were fully aware of the identity of those whose property they were seeking to affect. In that situation, the further remarks of this Court in the *Mullane* case become apposite (339 U. S. at 318):

"Exceptions in the name of necessity do not sweep away the rule that within the limits of practicability

notice must be such as is reasonably calculated to reach interested parties. Where the names and post office addresses of those affected by a proceeding are at hand, the reasons disappear for resort to means less likely than the mails to apprise them of its pendency."

In the present case, the district judge also found (Fdg. 24, R. 34) that "It was the plan of defendant's said agents to kill only the horses belonging to plaintiffs and others of their small independent band of Indians, and not to destroy or to gather the horses of others." It cannot therefore be contended for a moment that the Government agents were not in a position to give personal notice to those about to be affected by their "abandoned horse" drive.

Finally, the Court in *Mullane* said (339 U. S. at 319):

> "The statutory notice to known beneficiaries is inadequate, not because in fact it fails to reach everyone, but because under the circumstances it is not reasonably calculated to reach those who could easily be informed by other means at hand."

There is no need to prolong the discussion; the *Mullane* case, without more, demonstrates the utter inadequacy in the present circumstances, as a matter of constitutional law, of the notice provided for by the Utah statute. Indeed, it is a fair inference from the findings of the trial judge that notice by publication was resorted to by the Government agents precisely because it did not amount to notice in fact, and so would further and facilitate the real objective of the plan of Kinnaman et al., which, as the district judge also found, was to deprive these Indians of the animals esential to their way of life, and thus to force them to leave the area (Fdgs. 20, 29, 3; R. 30-31, 37-38, 40-41).

The Government argues (Br. Op. 11) that the undisputed

testimony of the Asistant Range Manager is that he warned the Indians in August and September 1952 that there was going to be a horse round-up, citing what is now R. 132-134.[4] But this was the testimony of Black, whom the district judge disbelieved, for reasons cogently stated at R. 414:

> "Now there is only a pretension of an excuse for that here in my judgment, when these fellows say they didn't know they were running off Indian horses. I just don't believe it. And I observed their conduct on the witness stand. They were evasive. I observed their extreme reluctance to testify. * * * I observed in the case of Dee Black that finally he said he thought he had a notion as to who owned the horses. He thought they belonged to the Indians all right."

And see the trial court's further comments on Black at R. 171, 220, 269, and 404.

Consequently, anything Black may have said that is not affirmatively reflected in the findings amounts, not to "undisputed testimony" as the Government contends (Br. Op. 11), but simply to disbelieved testimony.

The Government further says (Br. Op. 11), "Petitioners do not suggest what other kind of notice could have been given. Certainly the Indians are not exempt from the rules and regulations governing the conduct of citizens with reference to federal property."

The short—and obvious—answer is that if the Government's agents here had complied with "the rules and regulations governing the conduct of citizens with reference to federal property", which, as we have shown (*supra*, pp. 16-17), were the rules and regulations set forth in the Fed-

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[4] The record references in the Government's Brief in Opposition are to the Court of Appeals transcript, the pagination of which differs from that of the printed record now before this Court.

eral Range Code, 43 CFR 161.11 (*infra*, p. 54), they would have given these petitioners notice, by personal service or registered mail. That is the kind of notice that the applicable law required to be given; that is the "other kind of notice" that "could have been given"; that is the "other kind of notice" that these agents had in previous years given these very Indians (R. 132).

B. *The record shows a discrimination against these Indian petitioners so palpable as to constitute a denial of equal protection of the laws.*

The district judge found (Fdg. 4, R. 20) that, after the creation of Utah Grazing District No. 6 pursuant to the provisions of the Taylor Grazing Act, permits to graze in the area used by petitioners were issued to white livestock operators, and also that, until 1946, petitioners were not disturbed in their use of those lands for grazing purposes in common with non-Indians (Fdg. 17, R. 28).

It was stipulated that, within the area in dispute, 3899 cattle and 33818 sheep are under permit from the Bureau of Land Management to white livestock operators (R. 410). This was the area from which the Government's agents drove and then destroyed 38 burros and 116 horses belonging to petitioners (R. 280).

In view of the provisions of the Taylor Grazing Act set out and discussed above, this amounted, on its face, to a discrimination between Indians and whites so utterly without justification as to involve a taking of petitioners' property without due process of law (*Bolling* v. *Sharpe*, 347 U. S. 497, 499).

But there was a further discrimination in the administration of the Utah abandoned horse statute, the statute on which the court of appeals relied, and the Government in this Court now relies, to justify the United States' spoila-

tion of these petitioners: That was in the Government agents' application of the redemption provisions.

The district judge found that, inasmuch as it was the Indians themselves that the Government's agents sought to remove through destruction of their horses, those agents did not intend to permit any redemption of Navajo horses, and granted no opportunity for redemption (Fdg. 24, R. 34).

The findings also disclose the following:

On one occasion, where one of the petitioners located his horses and asked to be permitted to reclaim them, payment of $60 per head was demanded by Government agent Black, a sum Black knew the Indian was unable to pay (Fdg. 26, R. 35).

On another occasion, petitioner Hosteen Sakezzie and his family tracked their animals 35 miles to a corral, where Sakezzie requested the said Black to return his horses. During the conversation, one of the white stockmen who was with Black left in his car and returned in a few minutes with several men armed with rifles, the loading mechanisms of which were worked before the Indians to convey to them the understanding that the Government agents were prepared to shoot the Indians if they attempted to retake their horses. Petitioner Sakezzie and his family became so frightened and intimidated by the threatening display of firearms that they departed peaceably and returned to their hogán without obtaining their horses. (Fdg. 27, R. 35-36.)

White men whose horses were gathered up by the Government agents were treated differently. "About 5 head of horses belonging to white men were in this range area and were unavoidably gathered with some of the plaintiffs' horses. The horses belonging to these white citizens were hauled directly to the corrals or pastures of the owners and

a fee of $2.50 per head to cover expenses was charged by defendant's agent." (Fdg. 26, R. 35.)

The record simply reeks with discrimination, directed against these Navajo Indians as a class. There was nothing accidental about what was done; the trial judge specifically found that the Government's agents intended to capture only the horses belonging to the petitioners (Fdg. 24, R. 34).

We submit that the foregoing facts establish, on their face, an unconstitutional denial of equal protection of the laws under color of state action. There is presented here an instance falling squarely within this Court's classic denunciation in *Yick Wo* v. *Hopkins*, 118 U. S. 356, 373-374:

> "* * * Though the law itself be fair on its face and impartial in appearance, yet, if it is applied and administered by public authority with an evil eye and an unequal hand, so as practically to make unjust and illegal discrimination between persons in similar circumstances, material to their rights, the denial of equal justice is still within the prohibition of the Constitution."

No fair or open minded person reading the present record can fail to conclude that Government agents here administered the Utah abandoned horse statute, under which they purported to act and which they now invoke to justify their actions, with a completely unequal hand and a thoroughly evil eye.

IV. THE DISTRICT COURT'S AWARD OF DAMAGES WAS PROPER

Analysis of the law and facts underlying the district court's judgment for damages shows that such judgment was proper.

A. *The evidence supports the award.*

At the close of the case, the district judge said in his oral opinion (R. 413):

> "* * * Damages are awarded against the defendant in the sum of $100,000.00 in this case.
>
> "Now, with respect to that, I doubt the testimony of several witnesses here with respect to the value of their own horses, and moreover, I accept the testimony of several witnesses here with respect to the consequential damage that flowed from the wrong involved in destroying these horses. There is elaborate testimony about the consequential damages to these individuals."

The district court then went on to make very specific findings as to the market value of the destroyed horses, their uniqueness, and their replacement cost (Fdg. 1, R. 39-40); as to the consequential damages suffered by petitioners (Fdg. 2, R. 40); and as to the damages to them by reason of pain and suffering (Fdg. 3, R. 40-41).

Those findings are supported by evidence (R. 284-286, 290, 325-330).

The trial judge was of course free to reject the evidence of value testified to by the government witnesses whom he disbelieved because of their shifty demeanor while on the stand (R. 414), and to reject as well the testimony as to what the destroyed horses were worth to the glue factory (R. 140, 142-153, 293). To suggest the latter as a proper measure of damages is to urge that the taking of an automobile is compensable by its value as scrap.

Without prolonging the discussion, it seems sufficient to point to Rule 52(a), F. R. Civ. P., which renders the findings as to value impregnable to attack, cf. *United States* v. *Grigalauskas*, 195 F. 2d 494 (C. A. 1), and to *Palmquist*

v. *Mine & Smelter Supply Co.*, 25 Utah 257, 70 Pac. 995, which reaffirms the Utah rule that a verdict for damages will not be set aside as excessive so long as there is any evidence to support such damages.

In the court below, the Government did not attack the further findings as to consequential damages, but contended that such damages were not recoverable as a matter of law. That contention is also unsound.

B. *The items of damage reflected by the judgment were proper under the Federal Tort Claims Act.*

The touchstone of the United States' liability under the Tort Claims Act is set forth in 28 U. S. C. § 2674,

> "The United States shall be liable * * * in the same manner and to the same extent as a private individual under like circumstances, but shall not be liable for interest prior to judgment or for punitive damages."

No element of interest is reflected in the judgment involved here, nor was anything awarded by way of punitive damages. Similarly, no item for which damages were awarded by the district judge falls within the only other exception in the Tort Claims Act that is applicable here, viz., 28 U. S. C. § 2680(h):

> "Any claim arising out of assault, battery, false imprisonment, false arrest, malicious prosecution, abuse of process, libel, slander, misrepresentation, deceit, or interference with contract rights."

It is true that the Government argued in opposition to the Petition for Certiorari (Br. Op. 9-10) that "an attempt to support the judgment under the Federal Tort Claims Act on a theory of malicious enforcement of a regulatory statute is fruitless because of the exclusion from

that Act of claims arising out of 'malicious prosecution, abuse of process,' " citing the foregoing provision. But that contention is aimed at a man of straw, not at petitioners' actual case. Petitioners sought recovery, not for malicious prosecution, not for abuse of process, but for the taking and destruction of their horses and burros, and for the damages consequent thereto (Complaint, R. 5-7). Their horses were destroyed, and every item of consequential damage for which recovery was adjudged not only was within the Tort Claims Act, see *Grigalauskas* v. *United States*, 103 F. Supp. 543 (D. Mass.), affirmed, 195 F. 2d 494 (C.A. 1), but was a proper subject for damages as a matter of Utah law.

Under Utah law, the basic measure of damages in tort cases includes the necessary and usual results of the wrong—the general damages—together with such special damages as are directly traceable to the wrongful acts complained of. *McKinney* v. *Carson*, 35 Utah 180, 99 Pac. 660.

Where property is destroyed, the measure is the difference between the market value of that property immediately before destruction, plus its use value until it can be replaced within the time required of a prudent plaintiff, less any salvage value of the destroyed property. *Park* v. *Moorman Mfg. Co.*, — Utah —, 241 P. 2d 914, 921. Here, as the district judge found, the salvage or glue-and-dog-food value of the destroyed animals was never paid to petitioners, but was retained by the Government or its agents (Fdg. 24, R. 34).

Deprivation of use has always been held to be a proper element of recovery (*Bergstrom* v. *Mellen*, 57 Utah 42, 192 Pac. 679), and reasonable rental value is a proper measure for such deprivation (*Anderson* v. *Jensen*, 71 Utah 295, 265 Pac. 745).

Pain and suffering, where it is the necessary and natural result of the defendant's acts, is compensable (cf. *Palm-*

quist v. *Mine & Smelter Supply Co.*, 25 Utah 257, 70 Pac. 994; *Webb* v. *Snow*, 102 Utah 435, 132 P. 2d 114), and, where the defendant's acts have been wanton and willful—as indeed they were in this case—damages for fright can also be recovered (*Jeppsen* v. *Jenson*, 47 Utah 536, 155 Pac. 429).

Here the horses that were destroyed had a unique value because of the nature of their training and the difficulty in replacing them, all as is duly set forth in Fdg. 1 (R. 39-40). Any contention by the Government that it should be liable only to the value of ordinary horses is as untenable as an argument that a tortfeasor's liability to pay damages for loss of earning power (*Clawson* v. *Walgreen Drug Co.*, 108 Utah 577, 162 P. 2d 759) is satisfied on the basis of average earnings in the community even though the specific injured person was prior to the tort, an individual in the high income brackets.

Utah law excludes only remote, conjectural, or contingent losses (*Graham* v. *Street*, 2 Utah 2d 144, 270 P. 2d 456). No such items are reflected in the detailed findings (1-3, R. 39-41) on which the trial court's judgment in petitioners' favor was based.

C. *The Judgment Was in Proper Form*

The present action was brought by thirty separate plaintiffs because of the common nature of their claim; it is not disputed that such joinder was proper under the first sentence of Rule 20(a), F. R. Civ. P., viz.: "All persons may join in one action as plaintiffs if they assert any right to relief jointly, severally, or in the alternative in respect of or arising out of the same transaction, occurrence, or series of transactions or occurrences and if any question of law or fact common to all of them will arise in the action."

A single judgment for damages was granted in petitioners' favor (R. 47-48), and the court of appeals questioned

"whether the entry of a joint judgment in a case of this kind, where each plaintiff has a separate claim, is in accordance with Rule 20(a)" (R. 433).

That query involves the last sentence of Rule 20(a), viz., "Judgment may be given for one or more of the plaintiffs according to their respective rights to relief * * *."

The most scholarly commentator on the Civil Rules (3 Moore, *Federal Practice* (2d ed.) ¶20.05, p. 2722) has said that the sentence just quoted "gives the court ample power to mould its judgment to fit the merits of the case."

We think that only particular petitioners have standing to complain of the form of the judgment—and none has made complaint. To that extent, the rights of an individual petitioner to a separate judgment has been waived. Cf. *United States* v. *Runner*, 174 F. 2d 651, 652 (C. A. 10). Moreover, to the extent that formal apportionment of the judgment seems necessary, a basis therefor is found in the schedule of ownership stipulated into the record (R. 279-280).

V. THE GOVERNMENT'S AGENTS WERE PROPERLY ENJOINED FROM FURTHER INTERFERING WITH PETITIONERS

As has been shown, the United States brought suit in 1950 to enjoin the Navajos, including some of the present petitioners, from grazing any of their stock in the area now in question, and that suit was dismissed on the ground that it would require the district court to perform duties vested by law in the Secretary of the Interior. *United States* v. *Hosteen Tse-Kesi*, 93 F. Supp. 745 (D. Utah). The Tenth Circuit reversed and reinstated the complaint on the merits. *United States* v. *Hosteen Tse-Kesi*, 191 F. 2d 518 (August 30, 1951).

These depredations followed, from September 19, 1952, to February 20, 1953 (R. 54, ¶7), after which the Bureau of Land Management represented "that the defendants have returned to the Reservation and that there are no more

trespassers." The district court on June 27, 1953 accordingly dismissed the suit against *Hosteen Tse-Kesi, et al.* as moot. (Fdg. 18 at R. 29.)

It appeared at the trial of the present case that Kinnaman, the instigator of the depredation here complained of, was aware of the pendency of the *Hosteen Tse-Kesi* proceeding when he put the abandoned horse program into effect (R. 76-78), a circumstance that led the district judge to make reference to the statute denouncing the obstructing of justice (R. 78). Then, when Kinnaman further admitted that he was continuing right at the very time of the trial of the present case, to destroy any horses he found (R. 84), the district judge directed counsel for the petitioners to prepare a temporary restraining order (R. 84), saying further:

> "That litigation was pending here at the time these fellows took this matter into their own hands. You have a very serious situation, not just with respect to whether they recover damages; I am talking about an indictment. I am talking about contempt of this court. I am talking about obstructing justice by people who are parties plaintiff to the litigation in this court—the Bureau of Land Management, taking the matter into their own hands, going out and destroying property belonging to the defendants; to a proceeding in this court which was not disposed of, which was pending here."

Later in the trial, the judge said (R. 222-223):

> "As a matter of fact, the depredations of which there is complaint here were committed while this court had pending before it the very questions we have here. The Bureau of Land Management officials, it seems to me, may very well be in contempt of this court, because the Bureau of Land Management was the plain-

> tiff in that action and while this action was pending here they saw fit to take the matter into their own hands. * * * I think that force and violence ought to end in this matter—and before we get through I am going to issue an injunction about that, so that the folks will be answerable to me. I am going to reserve some jurisdiction for that purpose here."

And thereafter, but still during the trial, the district judge reiterated his purpose to enjoin further depredations (R. 274, 276), and he repeated that purpose in the course of his oral opinion (R. 417-418).

Accordingly (R. 48-49), jurisdiction was retained to determine the question of petitioners' rights to the land in question—which had been the basic issue in the *Hosteen Tse-Kesi* case—and "defendant, its officers, agents and employees, individually and collectively, and all others acting in behalf of" or in cooperation or conjunction with the foregoing were enjoined:

> "from the further harassment or molesting of plaintiffs, their families and the members thereof, in their quiet and peaceable possession, and use of the said public lands; from the killing, molesting, driving, moving or interfering with the livestock owned or operated by plaintiffs upon these public lands, and from taking further action under any of the applicable laws and regulations to dispose of any of said lands or any interests therein * * *."

In the circumstances disclosed by the record, was the foregoing injunction proper?

Petitioners concede that, since the United States cannot be sued without its consent, it was improperly named as a party to the injunction, and therefore, agree to a modifica-

tion of the order accordingly. But the injunction was entirely proper as against the officers and agents of the United States, and indeed was required under familiar equitable principles.

The record showed that Kinnaman proceeded to carry out his abandoned horse program well knowing that litigation to determine rights of occupancy to the area was pending in a court of the United States—as flagrant a flouting of judicial authority as can be imagined. The record also shows that, after Kinnaman's depredations were virtually completed, counsel for the United States represented that the case had become moot because "the defendants have returned to the Reservation" (Fdg. 18 at R. 29). In view of the circumstance that petitioner's removal had been effected involuntarily by Kinnaman and other agents of the United States, that representation fell substantially short of the candor which counsel are normally expected to display when seeking dismissal of pending litigation.

The record further shows that Kinnaman, even while testifying, brazenly announced from the witness-stand that he proposed to destroy any further horses that he found (R. 84).

And, finally, the record shows that the land on which the fields and hogan of the petitioner Sakezzie were located had been awarded as grazing range to Delbert and Leland Redd (R. 122-123). The latter had assisted Black in the round-up of petitioners' horses (R. 136, 141, 396, 397); he had demanded and received $480 from an Indian whose sheep he had impounded (R. 172); and he admitted having written the Secretary of the Interior urging action to rid the area of Indian use (R. 400-401).

In those circumstances, an injunction to prevent further interference of any kind with petitioners was amply justified. It is well settled that there is equitable jurisdiction

where the injury complained of is of a continuous character (*Osborne* v. *Missouri Pacific R. Co.*, 147 U. S. 248, 258-259), or where complaint is made of a continuing trespass (*Archer* v. *Greenville Sand & G. Co.*, 233 U. S. 60, 66). Similarly, an injunction lies to prevent future wrong (*Swift & Co.* v. *United States*, 276 U. S. 311, 326). The power of equity to enjoin a multiplicity of suits has never been doubted (*Insurance Company* v. *Bailey*, 13 Wall. 616, 621; *cf. Texas* v. *Florida*, 306 U. S. 398, 406-407). And of course a court has jurisdiction to effectuate its own decrees to avoid relitigation (*Root* v. *Woolworth*, 150 U. S. 401, 411-412).

In view of these authorities, which are of course in no sense unique, it is plain that, except for the inclusion of the United States as a party against whom it was directed, the injunction issued by the district court was eminently proper.

Conclusion

Unless it is now to be held that the United States has a right to despoil its Indian wards with impunity, the judgment below must be reversed, and that of the district court affirmed. Moreover, the injunction of district court should be reinstated, subject to the modification just indicated.

Respectfully submitted,

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APPENDIX

STATUTES AND REGULATIONS INVOLVED

A. Federal Statutes

The Taylor Grazing Act of June 28, 1934, c. 865, 48 Stat. 1269, as amended, 43 U.S.C. §§315 *et seq.*, provides in pertinent part as follows:

Section 2, 43 U.S.C. §315a.

> The Secretary of the Interior shall make provision for the protection, administration, regulation, and improvement of such grazing districts as may be created under the authority of Section 1 of this Act [section 315 of this title], and he shall make such rules and regulations and establish such service, enter into such cooperative agreements, and do any and all things necessary to accomplish the purposes of this Act [chapter] and to insure the objects of such grazing districts, namely to regulate their occupancy and use, to preserve the land and its resources from destruction or unnecessary injury, to provide for the orderly use, improvement, and development of the range; * * * and any willful violation of the provisions of this Act [chapter] or of such rules and regulations thereunder after actual notice thereof shall be punishable by a fine of not more than $500.

Section 3, 43 U.S.C. §315b.

> The Secretary of the Interior is authorized to issue or cause to be issued permits to graze livestock on such grazing districts to such bona fide settlers, residents, and other stock owners as under his rules and regulations are entitled to participate in the use of the range, * * *. Preference shall be given in the issuance of grazing permits to those within or near a district who

are landowners engaged in the livestock business, bona fide occupants or settlers, or owners of water or water rights, as may be necessary to permit the proper use of lands, water or water rights owned, occupied, or leased by them, * * *.

Section 5, 43 U.S.C. §315d.

The Secretary of the Interior shall permit, under regulations to be prescribed by him, the free grazing within such districts of livestock kept for domestic purposes; * * *

Section 16, 43 U.S.C. §315n.

Nothing in this Act [chapter] shall be construed as restricting the respective State from enforcing any and all statutes enacted for police regulation, nor shall the police power of the respective States be, by this Act [chapter], impaired or restricted, and all laws heretofore enacted by the respective States or any thereof, or that may hereafter be enacted as regards public health or public welfare, shall at all times be in full force and effect: *Provided, however,* That nothing in this section shall be construed as limiting or restricting the power and authority of the United States.

B. Federal Regulations

The pertinent provisions of the Federal Range Code, 43 CFR 161.1 *et seq.*, provide:

Sec.161.6 *Issuance of licenses and permits*—(a) *Free-use licenses and permits.* Free-use licenses or permits first will be issued to free-use applicants for not to exceed the number of livestock kept for domestic purposes. Such livestock shall be grazed on Federal range in the immediate neighborhood of the residence of the licensee or permittee.

Sec. 161.11 *Procedure for enforcement of rules and regulations*—(a) *Service of notice.* Whenever it appears that there has been any willful violation of any provision of the act or of the Federal Range Code for Grazing Districts, the range manager will cause the alleged violator and any interested lien holder who has filed notice of his lien with the Bureau of Land Management to be served with a written notice, which will set forth the act or acts constituting such violation and in which reference will be made to the provision or provisions of the act or the Federal Range Code for Grazing Districts alleged to have been violated. Such notice may be served in person or by registered mail and the affidavit of the person making personal service or the registry receipt shall be preserved.

(b) *Unlawful grazing on Federal range; removal of livestock; impoundment.* Whenever the charge consists of unlawfully grazing livestock on the Federal range, the notice served on the alleged violator and any interested lien holder who has filed notice of his lien with the Bureau of Land Management will order the alleged violator to remove the livestock or to cause them to be removed immediately or within such reasonable time as may be specified. If the alleged violator fails to comply with the notice the range manager may proceed to exercise the proprietary right of the United States in the Federal range, under local impoundment law and procedure, if practicable; otherwise he may refer the matter through the usual channels for appropriate legal action by the United States against the violator.

C. State Statutes

The Utah Code Annotated, 1953, insofar as pertinent here, provides:

4-12-24. *Unauthorized removal of animals from range —Misdemeanor.*

Any person, other than the owner or his agent, who drives any horses, mules, cattle or sheep from their usual or customary ranges or from any field, yard or street farther than to the nearest or most convenient corral and neglects to return such horses, mules, cattle or sheep immediately to their accustomed range or place from which they were driven is guilty of a misdemeanor.

17-5-7. *Special meetings—How called—Business limited*

If at any time the business of a county requires a special meeting of the board, such meeting may be ordered by a majority of the board or by the chairman thereof. The order must be signed by the members or chairman calling such meeting and must be entered in the minutes of the board. Five days' notice of such meeting must be given by the clerk to the members not joining in the order. The order must specify the business to be transacted at such meeting, and none other than that specified shall be transacted at such special meeting unless all the members are present and consent thereto.

The Utah abandoned horse law, Chapter 2 of Title 47 of the Utah Code Annotated, 1953, is as follows:

47-2-1. *"Abandoned Horse" Defined*

The term "abandoned horse" as used in this chapter means any horse, ass, mule or other animal of the genus equus, unbranded, or, if branded, that has escaped assessment for taxation for the year next preceding the killing of such animal as hereinafter provided for,

and running at large upon the open range of this state, and includes a foal running with a dam coming within the above definition. An animal not bearing a decipherable brand recorded in the office of the recorder of marks and brands shall be deemed unbranded.

47-2-2. *"Open Range" Defined*

The term "open range" means all land not privately owned, and includes all roads, outside of private inclosures, used by the public, whether the same have been formally dedicated to the public or not.

47-2-3. *Abandoned Horses on Open Range, A Nuisance.*

It shall be unlawful for any person to suffer or permit any abandoned horse to run at large upon the open range, and every abandoned horse is declared to be a public nuisance and a public menace, and is condemned subject to the right of its owner to reclaim it under the conditions hereinafter provided.

47-2-4 *Elimination by County Commissioners—Notice of Intention.*

The board of county commissioners may provide for the elimination of abandoned horses in the respective counties in the following manner:

They shall cause notice to be published at least once a week for three successive weeks in some newspaper of general circulation published in the county, and such notice shall also be posted in at least five public places outside of the county seat on public highways in such county, and in three public places at the county seat, one of which shall be at the front door of the court house. The notices posted outside of the county seat shall be posted not less than two miles apart, and

all posted notices shall be posted at least thirty days before the date which the county commissioners shall fix for the beginning of the elimination of abandoned horses from the range in such county as hereinafter provided. If no newspaper is published in the county, publication in a newspaper shall not be required.

Such notice shall be substantially in the following form:

Notice is hereby given that in accordance with the provisions of law the board of county commissioners of ..... County, Utah, will proceed to eliminate abandoned horses from the open range in said county, and that beginning on the ..... day of ....., 19..., a drive will be held, and all abandoned horses running upon the open range will, under the direction and supervision of the county commissioners, be eliminated. All owners of horses running upon the open range are hereby given notice to file with the board of county commissioners a description of such horses, and the brands or marks thereon.

Dated this ..... day of ....., 19...

By order of the board of county commissioners of ..... County, Utah.

.....
County Clerk.

47-2-5. *Elimination by County Commissioners—Method.*

The manner and method of eliminating abandoned horses from the open range shall be in the discretion of the board of county commissioners, and it shall be its duty to so eliminate abandoned horses, using the means most effective and economical under the circumstances. The board may, in its discretion, sell all captured horses.

47-2-6. *Owners May Repossess—Damages—Taxes.*

Any person owning any horses which are running at large in any county in which the board of county commissioners has given notice of intention to make a drive, as provided in this chapter, may within thirty days after posting or the first publication of the notice mentioned in section 47-2-4 file with the board of county commissioners a description of such horses claimed by him, giving the marks and brands, if any, which appear thereon, and, if the board of county commissioners shall take into its possession any horses so claimed, it shall by registered letter addressed to the owner or claimant of such horses notify him that the same may be claimed within ten days from the mailing of such notice; and such owner or claimant shall be permitted upon application to the board to take possession of such horses upon payment of the expense of caring for the same from the date of capture. If any horses are killed by the county commissioners under the provisions of this chapter, a description of which has been reported by the owner thereof to the board, and ownership of such animals can be satisfactorily established, such owner shall receive as damage therefor a sum not exceeding $10 for each animal; *provided*, that he has paid all taxes assessed against said animal; *provided further*, that payment of such claims may be made only from proceeds of sales of captured horses.

47-2-7. *Elimination from Private Property on Request.*

Abandoned horses may be eliminated from privately owned land by the board of county commissioners in the same manner as from the open range when requested so to do by the owner of such land.

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1955

No. 231

BILL HATAHLEY, ET AL.,

Petitioner,

v.

UNITED STATES OF AMERICA

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

PETITIONERS' REPLY BRIEF

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I. The District's Court's Explicit Findings of Fact Cannot Be Set Aside by Reason of Anything in the Government's Unwarranted Attack upon the Trial Judge.

A. Apparently, on the theory that the only course open to the Government in a case weak on both the law and the facts is abuse of the court below, the Government launches an attack on the tria' judge (U. S. Br. 14-20) as vicious as it is unwarranted. Disregarding the obvious evasiveness and even hostility of the Government's witnesses, which would have taxed beyond limit the patience of any jurist, the Government, by this unwarranted attack upon the trial judge, seeks to lay the groundwork for an assault upon his specific and explicit findings of fact. Passing the question of professional proprieties involved in that course, it is plain that the record shows no foundation for the

Government's strictures and overwhelmingly establishes that the district court's findings of fact are fully sustained by the evidence.

B. At the outset, it is important to note the sequence of events at the trial.

The first witness called by the petitioners, plaintiffs below, was Kinnaman, the federal range manager (R. 62). He early showed himself to be an evasive witness (R. 73-74, 75-76). However, he testified without incident until it developed that he had instituted the destruction of petitioners' horses—the subject matter of the present case—during the pendency of the *Hosteen Tse-Kesi* litigation (R. 77):[1]

> "Q. Now, that action did come before this court and you were aware of that, weren't you, Dale?
>
> "A. Yes, I was.
>
> "Q. And you knew what action this court took in this case, did you not?
>
> "A. Yes.
>
> . . . . . .
>
> "Q. You had not gotten the horses eliminated by the case you had brought in this court, had you?
>
> "A. No.
>
> . . . . . .
>
> "Q. So you decided that was too slow, that you would take the matter into your own hands and get rid of these horses?
>
> "A. We decided to put the abandoned horse program into effect, yes."

At this point the trial judge asked questions designed to elicit whether the witness had been aware of the pend-

[1] 93 F.Supp. 745 (D. Utah), reversed 191 F.2d 518 (C.A. 10).

ing litigation when he commenced the destruction of petitioners' horses (R. 77). Kinnaman answered several of the judge's questions evasively (R. 77-78). Then (R. 78):

"Q. And you went ahead, regardless of the proceeding here; is that right?

"A. Yes, I went ahead, thinking I knew the status of the land at that time, that I was acquainted with the proper ownership of the land at that time."

This caused the trial judge to remark concerning the section of the criminal code about obstructing justice (R. 78).

It shortly developed that Kinnaman continued with the very depredations of which complaint was made after this suit was filed and while the trial was in progress (R. 82, 84):

[R. 82] "Q. You mean you went right on killing the horses even after this case was filed with which we are here concerned?

"A. I don't recall that we killed any horses, no.

"Q. Did you ship any?

"A. Yes

"Q. You had them destroyed in the same way, then —is that true?

"A. Yes, there were some that were shipped.

[R. 84] "Q. Any horses you find there yet you are continuing to destroy?

"A. Yes."

It was at this juncture that the trial judge requested counsel for the petitioners to prepare a temporary restraining order, saying (R. 84):

"The Court: That litigation was pending here at the time these fellows took this matter into their own hands. You have a very serious situation, not just with respect to whether they recover damages; I am talking about an indictment. I am talking about contempt of this court. I am talking about obstructing justice by people who are parties plaintiff to the litigation in this court—the Bureau of Land Management, taking the matter into their own hands, going out and destroying property belonging to the defendants; to a proceeding in this court which was not disposed of, which was pending here."

It is to be noted that every one of the alleged instances of bias on the part of the trial judge which are cited in the Government's brief (U.S. Br. 16-18) followed the disclosure (R. 77-78) that Kinnaman had, during the pendency of the earlier litigation, proceeded to reach the desired result in a shorter, if less legal way. And most of the other instances cited by the Government as reflecting bias on the part of the judge followed his comments as to the lack of credibility and the evasiveness of the Government agents whom he had observed on the stand (R. 80, 104, 108-109, 160, 171, 220).

The Government says (U.S. Br. 16):

"* * * the District Court read into every step of the elimination program a calculated, vicious plot to 'destroy the ability, if not the will of plaintiffs, to further inhabit this range' (R. 45). Commencing the case with that conviction (R. 87-88, 89, 100), the court conducted the trial in a manner hostile and prejudicial to the Government's case and demonstrably allowed inferences from its conviction, rather than from all the facts, to determine its findings."

The very citations relied on demonstrate the utter lack of foundation of the accusation; they establish that the court formed its conviction after hearing the testimony of the evasive and reluctant witness who was the prime mover in the program of depredation. That the judge's conviction became stronger as more testimony was heard proves not that the judge's conduct was prejudicial or unjudicial, but that the trial judge became increasingly indignant as he learned the full enormity of what the Government agents had done.

C. There are indications in the Government's attack against the trial judge which seek to imply that his views at the present trial were foreshadowed by his opinion in the *Hosteen Tse-Kesi* case, *supra*, page 2, note 1 (U.S. Br. 16, n. 3). But if the United States Attorney believed that the opinion previously expressed was indication of improper prejudice, the provision for disqualification (28 U.S.C. § 144) afforded an ample remedy. Certainly present-day prosecutors have not been squeamish in invoking that section. Cf. *United States* v. *Lattimore*, 125 F. Supp. 295 (D.D.C.). And never until now, so far as we are aware, has the Government substituted, for its failure to make timely use of 28 U.S.C. §144, an appellate assault upon the trial court's impartiality.

D. The Government fails to show error in any specific finding except for the immaterial matter noted below, p. 6, of a horse's leg having been shot off instead of sawed off. Otherwise, it fails utterly to show that in any instance Government trial counsel made any offer of proof where complaint is now made of the curtailment of examination of Government witnesses (U.S. Br. 17, 58-59, 61). All that the Government's objection comes to, therefore, is a general pique because the trial judge expressed resentment and indignation over the outrageous conduct of the Government's agents.

The one finding that can be shown wrong in any particular is that sentence in Fdg. 25, R. 35, which states that Black, a Government agent, sawed off the protruding leg of one of petitioners' horses. The testimony shows that, in fact, Black shot off this horse's foot (R. 301).

This minor variance[2] is hardly helpful in any of the controlling issues in the case and only adds to the grisly brutality of the scene described by Black (R. 301). The Governments asserts (U.S. Br. 16, n. 4) that it is "typical of the court's attitude and accuracy" but fails to point out any portion of any other finding that is deficient in evidentiary support.[3]

E. It must be borne in mind that, in order to set aside findings of fact made by a trial judge who heard the witnesses and observed their demeanor, "the reviewing court on the entire evidence" must be "left with the definite and firm conviction that a mistake has been committed." *United States* v. *Gypsum Co.*, 333 U.S. 364, 395. Such a conviction is easier to come by when, as in the *Gypsum* case, the oral testimony adduced by leading questions is in conflict with contemporaneous documents. But where the findings, as here, reflect an evaluation of contradictory oral testimony given by witnesses, untrammelled by documents, the "tone of voice or the gloss that personality puts upon speech" (*Von Moltke* v. *Gillies*, 332 U.S. 708, 730) becomes vital, and any finding supported by evidence is impregnable to assault. As the Second Circuit recently said *per curiam*:

> "The words that a witness utters, although they must of course be the vehicle of whatever he has to contrib-

[2] Probably resulting from the dictator's "shot off" becoming the transcriber's "sawed off."

[3] We deal below, pp. 14-15, with the Government's contention that the circumstance that the trial judge disbelieved the Government's witnesses as to value renders his award of damages excessive.

nte, are again and again of no probative weight at all because of his address, his bearing and his apparent lack of intelligence."[4]

It is significant that the Court of Appeals in the present case did not set aside the findings, which, being explicit and factual, are wholly different from the conclusory findings of mixed fact and law as to "negligence" that were held not binding on appeal in *Dalehite* v. *United States*, 346 U.S. 15, 24, n. 8.

F. Except as to the barbarous detail of whether Government agent Black sawed off or shot off one horse's leg, the Government has not established the lack of foundation for any part of any finding. The Government has further failed to point to a single ruling made by the trial judge that was erroneous and in respect of which the United States Attorney properly preserved his record. And the Government has pointedly failed to disclose to this Court that the trial judge's justifiable and outspoken indignation over the shocking depredations committed upon non-English-speaking Indian wards of the United States did not precede but followed the unfolding of the evidence and the evasive testimony of the very Government agent who was responsible for the torts now in issue, and so represented not a pre-judgment but rather the considered after-judgment of an experienced United States District Judge.

For the rest, the Government's strictures reflect simply disagreement with that judge's appraisal of the legal effects of its agent's conduct. To those we turn; but we cannot forbear to express shock that the law officers of the Gov-

[4] *Purcell* v. *Waterman Steamship Corporation*, 221 F.2d 953, 954. The style of the opinion strongly suggests that it was written by the senior judge hearing the appeal, L. Hand, J., who added: "Conceivably, the day may come when appeals will be heard upon a completely faithful reproduction of the whole scene as it was in the court room. Absit omen; but at least until that horrid fate shall overtake our devoted successors, we shall continue to carry on as we have."

ernment should have deemed it part of their duty to make upon a member of the bench the kind of attack now presented to this Court in this case.

II. The Present Case Clearly Falls Within the Coverage of the Tort Claims Act

The Government seeks to impale petitioners on the horns of the following dilemma (U.S. Br. 45-47):

> Either the acts of Kinnaman et al. were authorized and within the scope of their authority, in which event the Government contends it is immune from liability under the exception for governmental functions in 28 U.S.C. § 2680 (a), or else those acts were unlawful and therefore unauthorized, and in consequence not done within the scope of the agent's employment (28 U.S.C. § 2671), again with immunity from liability.
>
> In other words, the Government says, regardless of the legality or otherwise of what these agents did, no purposeful act on their part can fasten liability on the United States, and these petitioners, Indian wards of the United States, must go uncompensated.

This is another example of the Government's efforts to show "that Congress intended to draw distinctions so fine-spun and capricious as to be almost incapable of being held in the mind for adequate formulation." *Indian Towing Company* v. *United States*, 50 U.S. 61, 68. A moment's consideration will suffice to demonstrate the unsoundness of the Government's position.

First. By solemn concession, made at the trial, the United States Attorney admitted the authority of the Government agents in this case (R. 64): "* * * we would like to indicate that we have no desire to deny this authority to do, as the agent of the government, of the Bureau of Land Management, what he did—what they actually did in this

case." We think that this concession cannot now be successfully challenged and that it is therefore not open to the Government to urge that the acts of its agents here in issue were outside the scope of their employment.

Second. The Government says (U.S. Br. 46-47) that petitioners are unable to make "a showing, essential to their case, how the very action these Government agents were authorized to take could be tortious, i.e., 'negligent or wrongful' within the Tort Claims Act."

A short answer to this effort to cut the heart out of the Tort Claims Act is that trespasses are compensable equally with negligent acts so long as they are within the scope of the Government agent's authority. True, "wrongful" does not impose absolute liability. *Dalehite* v. *United States*, 346 U.S. 15. But the opinion in that case shows that the word "wrongful" was added to the statute precisely because it was desired to make the United States liable for its agents' trespasses. The Court said (346 U.S. at 45):

> Petitioners rely on the word "wrongful" though as showing that something in addition to negligence is covered. This argument, as we have pointed out, does not override the fact that the Act does require some brand of misfeasance or nonfeasance, and so could not extend to liability without fault; in addition, the legislative history of the word indicates clearly that it was not added to the jurisdictional grant with any overtones of the absolute liability theory. Rather, Committee discussion indicates that it had a much narrower inspiration: "trespasses" which might not be considered strictly negligent. Hearings before a Subcommittee of the Senate Committee on the Judiciary on S. 2690, 76th Cong. 3d Sess. 43-44. * * *

Very plainly, the Tort Claims Act's coverage is not limited to the torts committed by careless jeep drivers or

forgetful surgeons. It is not a statute simply setting up a negligence practice on the non-jury side of the court. It covers trespasses as well.

Third. It is plain on the very basis of the Government's own arguments and Utah citations (U. S. Br. 55) that the conditions for liability on the part of the Government for acts done by its agents have been met. The principal is liable for the willful act of his agent that is committed in the scope of his employment and (a) in furtherance of his employer's interests, or (b) if the use of force could be contemplated in its accomplishment.

Here, scope of employment was admitted at the trial (R. 64); the Government argues at length that it was necessary to round up petitioner's horses and burros to regulate the range, i.e., that the round-up furthered Government interest; and obviously such animals cannot be rounded up without some use of force. Therefore, on the Government's own theory (U. S. Br. 55), all of the factors necessary to hold it liable are present in this case.

Fourth. Apart from the basic fallacy of supposing that the Tort Claims Act does not cover trespasses, the Government's argument is also unsound in failing to distinguish between acts that are authorized and those that are justified. A Government agent's act which is unauthorized cannot render the United States liable. An act that is authorized and that can be justified similarly does not render the United States liable; it is not tortious. That, we submit, is the true rationale of the exception for governmental functions. But an act that is authorized and that cannot be justified, i.e., a tort within the scope of the Government agent's authority, does entail liability. That is the situation in this case.

We think it clear that Congress did not intend to leave these Indian petitioners—or, for that matter, any other persons similarly aggrieved—remediless against trespasses

committed by Government agents within the scope of their authority but which cannot in any sound view be justified.

III. The Utah Abandoned Horse Statute Cannot Justify the Trespasses Committed by the Government's Agents

Petitioners do not propose to reargue every point contained in their opening brief. But they believe the Court will be assisted in its consideration of the present case if attention is drawn to some of the more obvious omissions, legal errors and factual misstatements that interlard the Government's brief.

A. *The Taylor Grazing Act occupied the field.*

The Government in this case is in the strange and antinational position of asserting that an Act of Congress designed to regulate grazing on the public domain does not fully occupy the field but instead leaves full play for the operation of an antecedent state statute whose provisions conflict with those of the Congressional enactment.

The clearest instance of the conflict is that, whereas the Taylor Act and the Federal Range Code provide for written notice served in person or by registered mail, the Utah statute provides only for notice by publication (Pet. Br. 16-17).

The Government's attempt to argue that the Range Code was inapplicable (U. S. Br. 26-27) fails on the basis of the very record references cited at those pages: The purpose—the obvious purpose—of the notice required by the Range Code was to give notice to the persons owning animals in the area sought to be cleared. About eight Indian families were affected. The Government's agents knew that the animals they were rounding up for destruction belonged to these Indians (U. S. Br. 26). And we may properly use as an admission against interest on this point the testimony of the otherwise unreliable witness Black (R.

171, 269, 404, 414) that he so far knew the owners of the horses that he gave them oral notice naming them (R. 133, quoted at U. S. Br. 34).

If oral notice could be given, then the written notice required by 43 CFR § 161.11 (Pet. Br. 54) could also have been given, and it is simply fatuous to argue (U. S. Br. 27) that compliance with those written notice provisions "would render elimination from the Federal range of abandoned animals difficult if not impossible as a practical matter in cases, like this, where the officials do not know the specific owners of the individual animals."

Moreover, nothing in the notice provision of the Federal Range Code (43 CFR § 161.11; Pet. Br. 54) requires that personal notice be that specific. It may be significant that the Government so far deems the exact terms of this provision unimportant that it is nowhere set out in the brief of the United States. But it is only by ignoring completely the terms of the state and federal notice provisions, as did the court below, that one can construct an argument that the two do not conflict.

B. *The provisions of the Utah abandoned horse statute were not followed.*

Seeking to sustain the obviously invalid proceedings under color of the Utah abandoned horse statute which its agents invoked to justify their destruction of petitioners' animals, the Government relies on the presumption of regularity of official acts (U. S. Br. 31, 41).

That reliance is misplaced. The testimony, set forth in detail at Pet. Br. 6-7, 26-31, shows that the official acts relied upon were irregular. Thus, the presumption is completely rebutted. Apart from this, there were no proceedings to which the presumption could attach. The Government argues that the round-up resolution was properly adopted at the July 1 meeting. But the minutes of that

meeting say nothing about the adoption of such a resolution and fail to show any discussion concerning its subject matter (U. S. Br. 32-33). The question for the district court was whether any proceedings concerning a round-up resolution took place on July 1. On conflicting oral testimony he found there were none (see Pet. Br. 6-7, 27). Accordingly, there was no occasion to indulge in the presumption of regularity.

To the extent that the matter could by way of assumption *arguendo* be deemed doubtful, it must be resolved in petitioners' favor by the rule that statutes like the one in question, which provide for summary proceedings, must be construed strictly (Pet. Br. 24-26). That rule is pointedly ignored by the Government.

C. *The notice given was patently inadequate.*

Petitioners urged (Pet. Br. 34-39) that the publication and posting of notices in English, where illiterate and non-English speaking Indians were sought to be affected, is so patently inadequate as to involve a denial of due process of law; and in support of the foregoing proposition cited, discussed, and relied upon a quite recent decision of this Court which considered the constitutional adequacy of notice of publication. *Mullane* v. *Central Hanover Bank & Trust Co.*, 339 U.S. 306.

The Government makes the anamolous argument that they did not know who owned the horses and that, in any event, petitioners had actual oral notice of the impending round up from Dee Black. This was the very same Dee Black whose credibility and attitude unfavorably impressed the trier of facts (R. 171, 269, 404, 414). He was finally expelled from the courtroom for laughing during the efforts of counsel for petitioners to elicit facts from an evasive and hostile witness, Leland Redd (R. 404). It was this man and another member of the Redd family to whom the Gov-

ernment awarded the grazing land from which its agents had driven petitioner Sakezzie (R. 122).

The Government has assailed the impartiality of the trial judge (U.S. Br. 14-20). Unless it is now to be the law that a disbelieved witness can be testimonially rehabilitated by a litigant's attack on the judge, the Government has failed to establish that, in fact, petitioners had notice of the horse-slaughter program.

So far as the law is concerned, petitioners are content to rest on the *Mullane* case—which is not even cited by the Government in over fifty printed pages of argument.

IV. The Damages Awarded Were Compensatory and Not Punitive

By way of preliminary on the issue of damages, petitioners desire to call attention to the circumstance that, while the Government states (U.S. Br. 6) that a total of $1,700 was received for petitioner's slaughtered animals, it does not disclose until thirty pages later (U.S. Br. 36) that no part of that sum was paid these petitioners. Instead (id.) all the proceeds went to the Advisory Board.

The Government also states (U.S. Br. 6): "Several [of the horses] were redeemed by Indians," citing R. 89, 144, 299. The first two references are to horses redeemed by Ute Indians (*accord*, R. 117). Petitioners, however, are Navajos, and this entire record establishes that a single Navajo horse, was released to an unidentified boy referred to as a Navajo (R. 299). Yet, the Government has no compunction in assailing the judicial integrity of the trial judge because he found that there was a concerted scheme directed at the present Navajo petitioners (U.S. Br. 16, 31, 35, 36, 42).

The Government's attack upon the award of damages (U.S. Br. 57-63) is premised primarily on the circumstance

that the trial judge disregarded the testimony of Government witnesses as to value and curtailed their examination.

As to the second point, if the United States Attorney had considered the trial judge's exclusionary rulings erroneously prejudicial, he would—and should—have made appropriate offers of proof. It matters not whether trial counsel was satisfied with the court's rulings or simply failed to protect his record at the trial. In either event his colleagues have no basis for complaint at the appellate level.

The conclusive answer to the balance of the Government's arguments as to value is that they fail to give any weight whatsoever to the circumstances that Navajo horses are specially trained, that they have have a unique place in the economy of their owners, and that they are in consequence not readily replaceable (Fdg. 9, R. 24-25; Edgs. 15-16, R. 27-28).

To recur to the familiar law school example of the race horse, the dray horse, and the saw horse, the vice in the Government's argument is that it attacks the award of damages as excessive because the trial judge did not award dray horse damages for the destruction of uniquely valuable race horses.

We do not contend for a moment that petitioners' animals were thoroughbreds in the Man of War, Citation or Nashua brackets, but neither can those horses understand Navajo commands. We do say that petitioners' horses were sufficiently unique that their destruction is not compensated by the market value of biologically similar animals that had not been bred to the country, trained in Navajo ways, or accustomed to Navajo commands.

For the rest, as we have already pointed out (Pet. Br. 42-45), the judgment rests on the findings, which in turn are supported by the evidence, and the items of damage included in that judgment were proper under the Federal Tort Claims Act.

The Government's remaining points do not call for further argument on our part.

Conclusion

For the foregoing additional reasons, the judgment below should be reversed.

Respectfully submitted,

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In the Supreme Court of the United States

OCTOBER TERM, 1955

No. 231

BILL HATAHLEY, ET AL., PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the court of appeals is reported at 220 F. 2d 666 (Pet. App. 25-35). The oral opinion of the district court and its findings of fact and conclusions of law appear at R. 400-405 and R. 19-49, respectively.

JURISDICTION

The judgment of the court of appeals was entered on March 1, 1955 (Pet. App. 35). A petition for rehearing was denied on April 15, 1955

(Pet. App. 36), and the petition for a writ of certiorari was filed July 13, 1955. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether the United States is liable under the Federal Tort Claims Act because its agents instigated and participated in, the enforcement on the federal range of a Utah statute for the elimination of abandoned horses which resulted in the confiscation of horses and burros claimed by the Indian petitioners.

STATUTE INVOLVED

The pertinent provisions of 5 Utah Code Annotated, 1953, Title 47, Chapter 2;[1] of the Taylor Grazing Act of June 28, 1934, 48 Stat. 1269, as amended, 43 U.S.C. 315, *et seq.;* and the Federal Range Code, 43 C.F.R. 161.1, *et seq.*, are printed at pages 19-24 of Petitioners' Appendix. In addition, Section 16 of the Taylor Grazing Act, *supra,* provides:

> *Sec. 16* [43 U.S.C. 315n]. Nothing in this Act shall be construed as restricting the respective States from enforcing any and all statutes enacted for police regulation, nor shall the police power of the respective States be, by this Act, impaired or restricted, and all laws heretofore enacted by the respective States or any thereof, or that may hereafter be enacted

[1] This is the same as Title 64, Chapter 2, Utah Code Annotated, 1943, which was in force during the period of the action in controversy.

as regards public health or public welfare, shall at all times be in full force and effect: *Provided, however*, That nothing in this section shall be construed as limiting or restricting the power and authority of the United States.

STATEMENT

Petitioners, Navajo Indians, instituted this action under the Federal Tort Claims Act, 28 U.S.C. 1346(b), to recover $100,000 as damages for the loss of 116 horses and 38 burros which, they alleged, were owned by them and were taken unlawfully from the federal range in Utah and killed or sold by agents of the Bureau of Land Management, Department of the Interior (R. 6-8, 278). The area involved is public domain administered as part of Utah Grazing District No. 6 under the Taylor Grazing Act (R. 20-21). It is in the southeast corner of the State of Utah and directly north of the Navajo Indian Reservation (R. 21).

On or about July 1, 1952, the Range Manager of this district, upon reports from his assistants that there were many abandoned horses on the range, decided to conduct a round-up and elimination of such horses in accordance with the usual practice under the provisions of Title 64, Chapter 2, Sections 1-6, Utah Code Annotated, 1943 (R. 107, 129, 140, 328-329).[2] He secured the approval of the members of the Board of Commissioners of

[2] At the same time he instituted an identical program in Grand County, Utah, which is Grazing District No. 9, also under his supervision, and far to the north of this area (R. 328-329).

San Juan County, Utah (R. 32-34, 45, 152-157, 349, 366, 373, 375-376, 402), and, commencing on July 10, 1952, posted and published the notices required by the Utah statute (R. 32-33, 90-91, 97, 107, 122-123, 302-303). The notices announced that the elimination drive would commence on August 10, 1952, and stated that "All owners of horses running upon the open range are hereby given notice to file with the Board of County Commissioners within (30) days from the date given below [July 10, 1952], a description of such horses and the brands and marks thereon" (R. 32-33).

Commencing on September 19, 1952, instead of on August 10, 1952, as announced, and continuing periodically up to the date of the filing of this action on March 20, 1953, the agents of the Bureau of Land Management, the local sheriffs, and white livestock permittees rounded up the horses and burros involved here and a few others (R. 8, 31, 36, 85, 93-94, 130, 344). The animals were herded together on the range, loaded into trucks and hauled to corrals where they were kept for periods up to two weeks (R. 142, 143). Nine animals were shot on the range in the gathering process because they were feeble or injured (R. 100, 135, 293, 297). Fifteen of the horses were sold locally (R. 150, 327-328). Several were redeemed by Indians (R. 94, 150, 296). A few were returned to white men (R. 99, 126-127, 149). The rest were transported out of the area and sold to a packing company near Provo, Utah (R. 103, 146-151, 291-293). Petitioners then instituted this suit.

The district court held that the United States was liable and awarded petitioners the $100,000 sought by them, as damages for loss of the animals, consequential damages and mental pain and suffering (R. 40-43, 47-49). The reasons stated for the court's decision were (1) that the round-up of these horses was willful, wanton and malicious and part of a plan to drive petitioners from the range; (2) that, because the Taylor Grazing Act and the Range Code issued thereunder had provisions for dealing with owners of trespassing livestock, the Utah statute relative to the elimination of abandoned horses was not applicable; and (3) that, even if the Utah statute were applicable, its provisions were not followed, because the court believed (a) the Board of County Commissioners did not officially authorize the program, (b) the Advisory Board [3] which was named by the Commissioners to direct the program did not officially accept the responsibility until October 9, 1952, after a number of horses had already been taken, (c) the horses were not abandoned within the meaning of the Utah statute, and (d) no effort was made to return them (R. 43-49). In addition, it enjoined the United States from further interference with petitioners or disposal of any of the

[3] The Taylor Grazing Act provides for the appointment by the Secretary of the Interior, from among the permittees, of a group of local stockmen, known as an Advisory Board, the functions of which are to offer suggestions and advice to the Government as to which applicants should be granted permits, and, in general, to advise in the management of the grazing district from which they are elected (R. 21). 43 U.S.C. 315 o-1.

public lands involved and reserved jurisdiction to try petitioners' claim to property rights in the area (R. 49-51).

On appeal by the United States, the court of appeals reversed. It held that the provisions of the Taylor Grazing Act did not preclude, but authorized, use of local police statutes and that the provisions of the Utah statute were followed (Pet. App. 25-35). Consequently the court did not discuss numerous other legal objections which the Government had to the judgment (see R. 1-5).

ARGUMENT

The limited issue here, as the court of appeals held, is whether the Utah statute, which provides for the removal from the open range and destruction of abandoned horses, was correctly invoked and followed in this instance on the federal range. Other issues framed by petitioners, as presenting important federal or constitutional questions, based on petitioners' claim of "ancestral homes on the federal range," on the wisdom of the Interior Department's handling of its affairs, and on alleged motives of agents of the Government are not material to the decision and, in audition, are without merit.

There has been no deprivation of property without compliance with statutory requirements (Pet. 10-11). The provisions of Sections 3 and 5 of the Taylor Grazing Act, Pet. App. 19-20, and the provisions of the Federal Range Code, 43 C.F.R. 161.6(a), 161.2(n), that preference shall be given in

the issuance of grazing permits to "bona fide occupants" of the federal range and free permits shall be given for "livestock kept for domestic purposes" which are valid "in the immediate neighborhood of the residence of the licensee" are not applicable to those who are occupants under claims of rights denied by the Government or to horses used to herd cattle and sheep over a large area of the range for other than domestic uses. The fact that petitioners were given permits for a time in the past is not significant. For many years prior to the action complained of here, they were repeatedly told to leave the area for the reservation and were denied permits (R. 21, 30). The footnote in the petition for certiorari (fn. 7, p. 11) is the first suggestion in this case that under these provisions the Department of the Interior was under a mandatory duty to issue permits to petitioners.

The provision of the Federal Range Code, 43 C.F.R. 161.11 (Pet. App. 20-21), requiring service of written notice to a violator of the prohibition in the Taylor Grazing Act against the unlawful grazing of livestock is not applicable to the facts here[4] (Pet. 11-13, 20-21). As the court of appeals correctly held, that provision relates to violations by

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[4] The action of *United States* v. *Hosteen Tse-Kesi*, 191 F. 2d 518 (C.A. 10), was instituted under this provision of the Range Code to enjoin the unauthorized herding and grazing of large numbers of cattle and sheep. It was appropriately dismissed when an investigation, requested by the Bureau of Land Management officials in Salt Lake City, showed that the Indians "have returned to the Reservation and that there are no more trespassers" (R. 30, 125-126).

known owners and "makes no reference to and has no application whatsoever to a program for the elimination of abandoned stock on the federal range" (Pet. App. 31). Contrary to petitioners' assertions (Pet. 12), the owners of the animals involved here were not known in the sense specified by the Range Code which dealt with service of written notice "in person or by registered mail" upon a named violator setting forth "the act or acts constituting such violation" (Pet. App. 20). The district court found that the employees of the Government knew that the horses "belonged to plaintiffs or to some of them" (R. 38). As that finding indicates and as the court of appeals noted, the most which the evidence supports is that "It was generally known to those who were rounding up the animals that they belonged to Indians * * *" (Pet. App. 29; R. 92, 108-109, 130-131, 292-296, 326-327, 336, 338, 378). Some of petitioners did not know at the time to whom the horses belonged (R. 148, 296, 305). Petitioners offered no records to sustain their assertion that the animals bore recorded brands (Pet. App. 29). A search of the records by government employees showed that no brands were registered (R. 152, 291-295, 305-306, 327). Petitioners' insistence that the written notice provisions of the federal regulations are applicable here would render elimination from the federal range of abandoned animals difficult if not impossible as a practical matter.

As the court of appeals held, the Utah police statute is applicable to the federal range. Indeed,

it has been invoked on the federal range often and over a long period of time, both before and since the enactment of the Taylor Grazing Act (R. 85, 107, 114, 129, 140, 328-329, 390-391). The items raised by petitioners to challenge its use and the method of its use in this instance are not valid. The area of public lands involved here is desert (R. 21, 26). Forage is sparse (R. 21, 28, 38). A serious drouth existed (R. 116, 190). The number of horses on the range had increased to hundreds and horses tend to ruin the range (R. 101, 129-130, 141). Those facts are undisputed. In such circumstances, the use of a customary method, prescribed by law, to rid this range of abandoned horses cannot be rendered illegal or wrongful by a finding that enforcement of the law was a subterfuge to drive petitioners from the area.[5] There is no evidence or finding which refutes the eminently reasonable basis presented by conditions on this range for enforcement of the statute. The presumption of regularity of the official acts of three agencies of two governments cannot properly be set aside and the acts rendered tortious where such reason exists and where failure to act would have been dereliction of duty. Moreover, an attempt to support the judgment under the Federal Tort Claims Act on a theory of malicious enforcement of a regulatory statute is fruitless because of the exclusion from that Act of claims arising

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[5] From the very commencement of the trial the district court held and expressed this conviction (R. 98).

out of "malicious prosecution, abuse of process", etc. 28 U.S.C. 2680(h).

The active participation of federal range employees (who sought the program), along with local sheriffs and livestock operators, does not defeat the validity of the enforcement as not being "by state officers" (Pet. 14). Also, it is not disputed that the members of the Board of Commissioners of San Juan County, authorized by the statute to cause its enforcement, approved the program and this method of enforcement from the beginning (R. 91, 101, 152-157, 349-381). A question as to the date of a formal resolution is immaterial. The Board paid for the timely publication of the notices and, under any view as to the date of their resolution, ratified the program by formal resolution before the round-up (R. 33-34, 91, 153-155, 350-351). All that the statute requires is that the Board "may provide for the elimination of abandoned horses" by causing "notice to be published * * * and * * * posted * * *" thirty days before beginning the elimination (Pet. App. 22).

Similarly unavailing is petitioners' charge of a denial of due process in the lack of adequate notice (Pet. 14-16). Notice was published and posted for a period longer than that required by the statute (R. 32, 85). Petitioners assert that the notice provided by the statute, being in the English language, was neither reasonable nor adequate. But the evidence shows that all prior programs had been noticed in English with the result that most horses of Indians promptly disappeared

from the range and such was the case this time (R. 85, 116, 140-141, 329-332). The horses were gathered from the range gradually over a period of six months (R. 8, 31, 85, 93-94). Petitioners watched many of them being "trucked past the trading post" (R. 266-267). Moreover, in addition to the written notices, the undisputed testimony of the Assistant Range Manager is that "in August and September of 1952, I went down there pretty near continuously in those months, telling the Indians and traders that there was going to be a horse round-up * * * I have been to Sakezzie's camp several times and told them * * *. Told Jim Hatahley" (R. 140). As a result, most of the horses were removed (R. 141). Petitioners do not suggest what other kind of notice could have been given. Certainly the Indians are not exempt from the rules and regulations governing the conduct of citizens with reference to federal property.

There was no discrimination against petitioners nor denial of equal protection of the laws (Pet. 16-17). The fact that only a few horses belonging to white owners were gathered may be explained by the smaller number of such horses loose on the range or by obedience to the notices of the round-up. Petitioners made no attempt to follow the redemption provisions of the statute (Pet. App. 23-24, 34). The assertions of discrimination, in that five horses were returned to white owners while "none of petitioners was given any real opportunity to redeem his animals" and that the fees required by the statute to be assessed for redemption were less

to white owners, are made without any recognition of differences in compliance with the procedures of the statute or of differences in "the expense of caring for the [horses] from the date of capture". Moreover, the horses of several Indians were returned to them (R. 94, 150, 296).

The case presents no important federal question. No justiciable question is presented by petitioners' challenge of the "validity and wisdom" of a decision by the Interior Department in the handling of its affairs as guardian of Indians and as administrator of the federal range where, petitioners conceive, there is a conflict of such interests (Pet. 8-9). That is a matter of administrative discretion of the highest order which is not subject to court review, both as a matter of general law (*Riverside Oil Co.* v. *Hitchcock*, 190 U.S. 316, 324-325; *Louisiana* v. *McAdoo*, 234 U.S. 627, 633), and as a matter specifically excluded from the Federal Tort Claims Act, 28 U.S.C. 2680(a).

Moreover, there is not the conflict of interests which petitioners urge. Petitioners stand on their assertion of a legal right, based on "ancestral" occupancy, to live on and use this area of the public domain adjacent to the Navajo Indian Reservation.[6] But against this position are the facts (a) that the Navajo Reservation was established by Treaty of June 1, 1868, 15 Stat. 667, as the "permanent home" for "the whole people of said na-

[6] They concede that the area involved is "federal range" and "public domain" (Pet. 2, 14).

tion or tribe" and by which the Navajos agreed to "relinquish all right to occupy any territory outside their reservation"; (b) that Congress enlarged the reservation along its northern boundary up to, but excluding, the area here in dispute by Act of March 1, 1933, 47 Stat. 1418; and (c) that Navajo Indians, including some of petitioners, have been enjoined from using the area by decision in *Young* v. *Eelorm*, 244 P. 2d 862 (Utah Sup. Ct., May 21, 1952), certiorari denied, 344 U.S. 886 (November 17, 1952), which, upon a full consideration of the question, held that Navajo Indians have no rights in the area. The United States has always asserted exclusive title to this area since the Treaty of 1868.[7] Thus the Department of the Interior acted in conformity with treaty, statute and court decision. It lacked power to enlarge the reservation. Rather than abusing its responsibilities in declining to extend the Navajo domain beyond that given by Congress (Pet. 9), the Department of the Interior reasonably refused to enlarge the reservation by indirect means.

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[7] That title is not open to adjudication in this tort action. Moreover, the claim of petitioners based on original Indian title (see *United States* v. *Hosteen Tse-Kesi*, 191 F. 2d 518 (C.A. 10)) was resolved against them when this Court held that original Indian title is not a compensable property interest as against the United States. *Tee-Hit-Ton Indians* v. *United States*, 348 U.S. 272.

CONCLUSION

The petition for a writ of certiorari should be denied.

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AUGUST, 1955

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In the Supreme Court of the United States

OCTOBER TERM, 1955

No. 231

BIBL HATAHLEY, ET AL., PETITIONERS

v.

UNITED STATES OF AMERICA.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

BRIEF FOR THE UNITED STATES

OPINIONS BELOW

The opinion of the Court of Appeals (R. 428–438) is reported at 220 F. 2d 666. The oral opinion (R. 413–420), findings of fact and conclusions of law (R. 18–48) of the District Court are not reported.

JURISDICTION

The judgment of the Court of Appeals was entered on March 1, 1955 (R. 438). A petition for rehearing was denied on April 15, 1955 (R. 439). The petition for a writ of certiorari was filed on July 13, 1955, and was granted on October 10,

1955 (R. 440). The jurisdiction of this Court rests on 28 U. S. C. 1254 (1).

QUESTIONS PRESENTED

1. Whether the United States is liable under the Federal Tort Claims Act because its agents instituted, and participated in, the enforcement on the federal range of a Utah statute for the elimination of abandoned horses which resulted in the confiscation of horses and burros claimed by the Indian petitioners and, if so, whether the judgment awarding $100,000 damages can be supported.

2. Whether the District Court had jurisdiction in a tort claims case to enjoin the United States and its agents from interfering with activities of Indians upon or from disposing of the public lands involved.

STATUTES AND REGULATIONS INVOLVED

The majority of the pertinent state and federal statutes and regulations are set out in the Appendix to petitioners' brief, pp. 52–58. Other pertinent provisions of state and federal laws are printed in the Appendix to this brief, *infra*, pp. 67–71).

STATEMENT

Petitioners, Navajo Indians, instituted this action on March 20, 1953, under the Federal Tort Claims Act, 28 U. S. C. 1346 (b), to recover $100,000 as damages for the loss of 116 horses and 38 burros which they alleged, were owned by

them and were taken wrongfully and unlawfully from the federal range in Utah and killed or sold by agents of the Bureau of Land Management, Department of the Interior (R. 5–7, 280). The complaint averred that the taking was willful as part of a plan, in collusion with white livestock licensees, to drive petitioners from the area involved, which they claim as their ancestral home (R. 6–7). The facts may be summarized as follows:

The area involved is public domain administered as part of Utah Grazing District No. 6 under the Taylor Grazing Act of June 28, 1934, 48 Stat. 1269, as amended, 43 U. S. C. 315 *et seq.* (R. 20). It is in lower San Juan County in the southeast corner of the State of Utah and directly north of the Navajo Indian Reservation (R. 20). The Indians on the reservation have in the past tended to come over into this area with their livestock (R. 142–143, 275). Petitioners, comprising eight families, claim, however, that they have always lived in the area involved, not on the reservation (R. 7, 18).

In February 1950, the United States instituted an action in the District Court below to enjoin certain Navajo Indians, including some of petitioners, from trespassing and grazing livestock upon this area (R. 29). The District Court dismissed the complaint on the grounds that (1) an injunction against the use of the lands would require the defendants to leave their homes, fields

and grazing grounds, and that the court had no authority to allot to the defendants any other place to live; (2) the court had no means of compelling obedience to an injunction, if issued; (3) it was the problem of the United States Department of the Interior and the Bureau of Land Management, and not that of the courts, to solve the conflict. 93 F. Supp. 745. The Court of Appeals reversed the dismissal and reinstated the complaint, in *United States* v. *Hosteen Tse-Kesi*, 191 F. 2d 518 (August 30, 1951). Coincidentally, several white stockmen who had licenses from the Government to graze livestock in this area sued in the Utah state court to enjoin certain Navajo Indians, including some of the petitioners (R. 404), from trespassing and grazing their livestock there. The Indians were enjoined. *Young* v. *Felornia,* 244 P. 2d 862 (Utah, May 21, 1952), certiorari denied, 344 U. S. 886 (November 17, 1952). The Utah court held that the Navajo Indians had no valid claim to use the area. It expressly rejected the claim of this group that it was a distinct band of Navajos having rights, based upon immemorial occupancy, to use this area outside the Navajo Reservation established by Congress as the "permanent home" for "the whole people of said nation or tribe." However, the Indians, including petitioners, continued to use the area (R. 142–143, 275).

About July 1, 1952, after those decisions of the Court of Appeals and the Supreme Court of

Utah but before final disposition of the suits, Dale Kinnaman, Range Manager of Grazing District No. 6 for the Bureau of Land Management, upon reports from his assistants, Dee Black and Robert Krumm, that there were many abandoned horses on the range, decided to conduct a round-up and elimination of such horses in accordance with the usual practice under the provisions of Title 64, Chapter 2, Sections 1–6, Utah Code Annotated (1943)[1] (R. 98, 119–120, 132–133, 335). At the same time, he instituted an identical program in Grand County, Utah, which is Grazing District No. 9, also under his supervision, and far to the north of this area (R. 335). As to San Juan County, Utah, he secured the approval of the members of the Board of Commissioners (R. 30–33, 43, 147–153, 358–359, 375–376, 383, 385–386, 415), and, commencing on July 10, 1952, posted and published the notices required by the Utah statute (R. 31–32, 79, 86–87, 98, 111–112, 306–307). The notices announced that the elimination drive would commence on August 10, 1952, and stated that "All owners of horses running upon the open range are hereby given notice to file with the Board of County Commissioners within thirty (30) days from the date given below [July 10, 1952], a description of such horses and the brands and marks thereon" (R. 31).

[1] The provisions of the 1943 Utah Code are the same as those of the 1953 Utah Code printed at pages 55–58 of petitioners' Appendix to their brief.

Commencing on September 19, 1952, instead of on August 10, 1952, as originally announced, and continuing periodically up to the date of the filing of this action on March 20, 1953, the agents of the Bureau of Land Management, assisted by the local sheriff and white livestock operators, rounded up the horses and burros involved here and a few others (R. 7, 34–35, 72–73, 81–83, 120–121, 352–353). The animals were herded together on the range, loaded into trucks and hauled to corrals where they were kept for periods up to two weeks (R. 134–137). Nine animals were shot on the range in the gathering process because they were feeble or injured (R. 89, 126, 296, 301). Fifteen of the horses were sold locally (R. 144, 333–334). Several were redeemed by Indians (R. 83, 144, 299). A few were returned to white men (R. 89, 116, 143). The rest, being unclaimed and unable to be sold locally, were transported by trucks to the Kuhni Packing Company near Provo, Utah, a distance of 350 miles, and sold for $1\frac{1}{15}$ cents to 3 cents per pound (R. 93, 139, 140, 292–296). A total of $1,700 was received for the animals (R. 34).

About three months after this suit was filed, in connection with the earlier trespass action by the United States, the Bureau of Land Management officials in Salt Lake City asked Dale Kinnaman for a report on whether the Indians were still grazing sheep on the federal range. He sent Dee Black onto the range and, upon Black's report

that they were not, furnished the Salt Lake City office with that information. (R. 114–115.) The District Court then dismissed that trespass action on June 27, 1953, for the reason that "it appearing to the Court upon representations by representatives of Bureau of Land Management that the defendants have returned to the Reservation and that there are no more trespassers, the questions involved in this case therefore being moot, it is ordered and adjudged that the above entitled cause be, and the same is hereby dismissed" (R. 29). This was some seven months after this Court had declined to review the state court judgment enjoining some of petitioners from using these lands.

Following subsequent trial of the instant case, at which details of the round-up were adduced and values for the horses and the extent of consequential losses were testified to, the District Court held that the United States was liable and awarded appellees $100,000, the amount sought, as damages for loss of the horses and burros, consequential losses, and mental pain and suffering (R. 38–41, 45–47). The reasons stated for the court's decision were (1) that the round-up and destruction of petitioners' horses and burros by the agents of the Government were willful, wanton and malicious and part of a plan to drive petitioners from the range; (2) that, because the Taylor Grazing Act and the regulations issued thereunder (Pet. Br. 53–54) had provisions

for dealing with trespassing livestock, the Utah statute relative to the elimination of abandoned horses was not applicable; and (3) that, even if the Utah statute were applicable, its provisions had not been followed because, the court believed, (a) the Board of County Commissioners did not officially authorize the elimination program, (b) the Advisory Board[2] which was named by the Commissioners to direct the program did not officially accept the responsibility until October 9, 1952, after a number of horses had already been killed, (c) the horses were not abandoned within the meaning of the Utah statute, and (d) no effort was made to return them (R. 41–48). Judgment was accordingly entered on January 30, 1954 (R. 49–50). In addition, although such relief had never been requested, the District Court enjoined the United States, its agents and employees from further interfering with petitioners and from disposal of any of the public lands involved and reserved jurisdiction to try petitioners' claim to property rights in the area (R. 47–49).

On appeal by the United States, the Court of Appeals reversed. It held that the provisions of

[2] The Taylor Grazing Act provides for the appointment by the Secretary of the Interior, from among the permittees, of a group of local stockmen, known as an Advisory Board, the functions of which are to offer suggestions and advice to the Government as to which applicants should be granted permits, and, in general, to advise in the management of the grazing district from which they are elected (R. 20–21). 43 U. S. C. 315 o–1, *infra*, pp. 69–70.

the Taylor Grazing Act did not preclude, but authorized, use of the local police statutes and that the provisions of the Utah statute were followed (R. 428–438). Consequently, it found it unnecessary to pass upon several other questions raised by the appeal (R. 433; see also statement of points, R. 1–5).

SUMMARY OF ARGUMENT

I

As stated by the Court of Appeals, the District Court tried this case with "maximum emotion and a minimum of judicial impartiality." The findings of fact, most of which the appellate court found it unnecessary to consider in detail, cannot reasonably be taken at face value. When the case is viewed in the light of all the pertinent facts, it becomes plain that the factual contentions of petitioners are unsupportable. This is especially clear with respect to the alleged plot or conspiracy among the Federal officers, State officials and private graziers.

II

A. The Court of Appeals correctly held that the United States is not liable here because the Taylor Grazing Act, by expressly preserving the police power of the respective States on the public domain, authorized use of the Utah statute providing for the abatement of the nuisance of abandoned horses. There is no conflict between the

two statutes as to preference rights, notice provisions, or subject matter. Petitioners, being trespassers, have no preference rights under the Taylor Act. Moreover, by disobeying permits once issued to them, petitioners forfeited the rights in the public domain they seek to assert here. The written notice required by regulation under the Taylor Act for trespasses by known owners of livestock has no application to abandoned horses. The Taylor Act does not deal specifically with the means of abating the nuisance of abandoned hores. The Utah statute condemns such horses as a "public menace." The abatement of that nuisance is an exercise of the "narrow" police power which petitioners concede was reserved to the States.

B. The provisions of the Utah statute were followed. The Board of County Commissioners validly authorized the program, and the irregularity petitioners assert in the Board's proceedings is insignificant. Under any view, it has no tendency to establish and could not have promoted the vicious plot found by the District Court. Nothing which the statute was designed to protect was infringed. The world was notified in exact conformity with the statute. Beyond the requirements of the statute, petitioners were specifically notified and more time than the statute required was allowed between the notice and the round-up.

The horses were abandoned within the terms of the Utah statute. Neither the findings nor the evidence supports petitioners' assertions that the horses bore recorded brands and that their ownership was known. In any event, the Utah statute is clear that knowledge of ownership is immaterial and that the fact of recorded brands is equally immaterial where an owner does not prove the fact in response to the statutory notices as required. These are eminently reasonable means of combating the problem of uncontrolled animals on the western ranges.

C. Petitioners are mistaken in their assumption (Br. 34–41) that they can recover on the ground that, if the state statute was properly invoked and fully complied with, its application to them was unconstitutional. Even on the faulty premise that invalidity of state proceedings could create a claim against the Federal Government, this argument fails for want of a showing that petitioners' constitutional rights were invaded. The record shows that they had ample actual notice of the proceedings under the Utah statute. And their charge of discrimination in applying the statute is not substantiated.

III

If petitioners had succeeded in showing a departure from either the Taylor Grazing Act or the Utah abandoned horse statute, they would

still have failed to state a claim on which relief could be granted against the United States under the Federal Tort Claims Act.

1. At the outset of their contentions in this Court petitioners pointed out (Pet. 2, fn. 2) that there is "no question here as to the authority of the Government agents to take the action complained of by petitioners." They do not and cannot show how the intentional performance of authorized action (there is no claim of negligence) could be "negligent or wrongful" under the Tort Claims Act. And assuming the words "negligent or wrongful" could somehow apply in such a case, this suit would nevertheless fall within the Tort Claims Act exemption (28 U. S. C. 2680) for "governmental functions" (*Dalehite* v. *United States*, 346 U. S. 15, 32) or exertions of "governmental authority in a manner which legally binds one or many" (*id.* at 59, dissenting opinion). Taking only the narrower view of the exemption stated in the *Dalehite* dissent, this is a case where the officials themselves would be exempt from liability (under the many cases like *Gregoire* v. *Biddle*, 177 F. 2d 579 (C. A. 2), certiorari denied, 339 U. S. 949), and "[t]he exception clause of the Tort Claims Act protects the public treasury where the common law would protect the purse of the acting public official." *Dalehite, supra*, at 60 (dissenting opinion).

2. Insofar as petitioners seem alternatively to suggest that the government agents in this case acted wholly without authority, in a conspiratorial plot stemming from personal malice, the actions of which they complain could not be "within the scope of [the] office or employment" of these agents, as is required for recovery under the Tort Claims Act. Apart from the strict rules of agency under federal law, this would be true as a matter of Utah law (*Barney* v. *Jewel Tea Co.*, 104 Utah 292, 296; *Sweatman* v. *Linton*, 66 Utah 208, 213), which is applicable on this point (*Williams* v. *United States*, 350 U. S. 857). The same conclusion follows from the fact that the federal officers here acted under state authority, by direction of state officials, and thus, on petitioners' own theory that such action was unauthorized, were outside the scope of their federal employment. *Sanchez* v. *United States*, 177 F. 2d 452 (C. A. 10); *Gleason* v. *Salt Lake City*, 94 Utah 1.

IV

As the Court of Appeals said (R. 433), the amount of damages the District Court awarded "appears to be more for punishment because of the methods used in eliminating the animals, rather than for the damages suffered * * *." The District Court plainly awarded punitive damages, contrary to 28 U. S. C. 2674, which forbids imposition of such liability upon the

United States. Thus, even assuming liability to any extent, the District Court's judgment could not be reinstated.

V

Petitioners sought no injunction, but the District Court nevertheless enjoined the United States and its agents from (1) interfering with petitioners and their livestock in the use of the public domain or (2) disposing "of any of said lands or any interests therein" until the court might determine the respective rights of the parties in this property. Petitioners concede (Br. 48–49) that the injunction against the United States was improper, and the injunction against the agents (who were not defendants in this action, which was solely one for damages under the Tort Claims Act against the United States) falls with this plainly correct concession.

ARGUMENT

I

THE COURT OF APPEALS CORRECTLY REGARDED THE FINDINGS AND DECISION OF THE DISTRICT COURT AS BEING INFLUENCED BY AN UNWARRANTED ATTITUDE OF HOSTILITY TO THE GOVERNMENT'S CASE

Petitioners rely in every point of their brief on the findings of the District Court. Those "findings" are argumentative, inflammatory, and sweeping. They contain statements so derogatory to respondent that it is deemed essential, at the outset, to show the unwarranted hostility of the

court from which those findings and the decision derived. The Court of Appeals declared, with respect to "the court's findings and decision," that "the case was tried in an atmosphere of maximum emotion and a minimum of judicial impartiality" (R. 432–433). As this Court said of similarly "profuse, prolific, and sweeping" findings in the tort action of *Dalehite* v. *United States*, 346 U. S. 15, 24, "no proper review could be exercised by taking the 'fact' findings of 'negligence' at face value." Thus, the following facts and circumstances are important preliminaries to a consideration of the legal issues in this case.

The area of public lands involved here is desert (R. 20, 25). Forage is sparse (R. 20, 27, 37). Therefore, the number of animals using it must be carefully controlled. A serious drought had existed for four or five years prior to the time involved here (R. 106, 191). The holders of grazing permits had been requested "to take as much non-use as they possibly could" (R. 107). The number of horses loose on the range without authority had increased to hundreds (R. 133). There had never before been so many (R. 119–120). Horses tend to ruin the range (R. 90). Control of the number of horses on the public domain by destroying the abandoned ones is customary and frequent practice in this area and in the surrounding country (R. 98, 119–120, 132, 335). It is the duty of the Range Manager and his assistants thus to protect the range, and they

would be remiss in their duty if they did not eliminate abandoned horses (R. 24, 90, 98, 119–120, 402–403). The permitting by range officials of unauthorized grazing has been held to constitute a cause of action by permit holders against the United States under the Federal Tort Claims Act. *Oman* v. *United States*, 179 F. 2d 738 (C. A. 10), involving another grazing district in Utah.

Overlooking those requirements of the area and the obligation of the Range Manager, the District Court read into every step of the elimination program a calculated, vicious plot to "destroy the ability, if not the will of plaintiffs, to further inhabit this range" (R. 45). Commencing the case with that conviction[3] (R. 87–88, 99, 100), the court conducted the trial in a manner hostile and prejudicial to the Government's case and demonstrably allowed inferences from its conviction, rather than from all the facts, to determine its findings.

The court continually characterized the round-up and elimination program as "horrible," "monstrous," "atrocious," "inhuman," "cruel," "cold-blooded depredation" and without a "sense of decency"[4] (R. 222–227, 326). It asserted that

[3] See pp. 3–4, *supra*, for the grounds of the same district judge for dismissing before trial the complaint in the *Hosteen Tse-Kesi* case, a decision reversed by the Court of Appeals.

[4] Typical of the court's attitude and accuracy is its finding that a horse's leg was "sawed off" (R. 35; Br. 8). The sole evidence on the subject is the following testimony (R. 301):

"these people have been treated worse than dogs" (R. 225). It interrupted the trial to tell stories of the treatment of dogs (R. 224–225, 330–331). It urged people through the public press to send money, food and clothing "through my office" to the petitioners (R. 224, 227, 246–247, 277–278, 281). It continually directed petitioners' counsel in the development of petitioners' case (R. 82, 87–88, 96, 97, 98, 99–111, 198–227, 230–236, 248–249, 253, 275–276, 278, 282–289, 361–367, 378–379, 385–389, 403–404), while limiting or depreciating the Goverment's case (R. 80, 84, 87–88, 160–161, 252, 269, 338, 343, 353, 361, 367–368, 379–382, 385–389, 403–404, 406–407).

The court led the evidence off into the history of the Navajo Indians and their dealings with the United States over land (R. 202–209, 215–219, 271–279, 318–321), and drew upon its own recollection of that history (R. 206–207, 216–217, 271–275), as well as upon its own opinion that the Indian problem had been mismanaged by the Bureau of Indian Affairs and the Bureau of Land Management (R. 217–227, 274), to support its conviction as to the motives of the Government's agents. Before the Government had presented any evidence the court stated that "if I had the authority in the executive department of

"One of them had his foot through the rigging, and we couldn't possibly get him out, and he was just about dead, anyhow, so we had to shoot him and shoot his foot off to get him out of the trucks."

the government I would knock somebody's heads together in the Bureau of Land Management and in the Bureau of Indian Affairs—and I would get this thing straightened out. And it wouldn't be Indians' heads that were knocked together, I'll tell you that" (R. 223). It charged those two agencies with being "derelict in their duties" (R. 223). The Government did not seek to controvert or make a record upon any of those matters because they are not within the issues presented. Nevertheless, the District Court conducted this case largely as a hearing on the administration of Indian affairs. It must be presumed that the Department of the Interior is fully aware of the true situation with respect to these Indians, and it is not chargeable with mismanagement on this one-sided picture before an unauthorized forum. For the court usurped the administrative function by using this action to make amends to the Indians for what it conceived were mistakes in administrative policy. And, as the Court of Appeals observed (R. 433), "the judgment appears to be more for punishment * * * rather than for the damages suffered * * *."

Also, the trial court severely criticized the agents of the Government and threatened them with contempt proceedings for conducting this round-up before the Government's trespass action in *United States* v. *Hosteen Tse-Kesi*, 191 F. 2d

518 (August 30, 1951), had been finally disposed of by the District Court on remand (R. 29, 77–78, 84–85, 114–115, 217–218, 221). It expressed no criticism of the fact that, during the pendency of the same action, petitioners, some of whom were defendants in that action, and others came into the area with a "big invasion" of sheep and cattle (R. 132, 275). It expressly minimized the fact that, prior to the round-up, some of petitioners had been enjoined from using the area by the Supreme Court of Utah in *Young* v. *Felornia,* 244 P. 2d 862 (Utah, May 21, 1952), certiorari denied, 344 U. S. 886 (November 17, 1952), which, upon a full consideration of the matter, decided that the Indians had no right whatever to be in the area[8] (R. 84, 226, 403–404).

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[8] There runs through petitioners' argument the theme that they have rights in this area based upon their asserted immemorial possession. They draw support for this assertion from the finding of the District Court to that effect. That finding is, of course, outside the issues of this case. Petitioners' claim was shown to be fallacious by the two state courts before whom that issue was properly and fully presented. *Young* v. *Felornia, supra.* As in the findings of the District Court, petitioners' only answer to that case is to ignore it.

The District Court's charge (R. 45) that the United States did not intend to allow petitioners to have their claim to possessory rights tried in court is indeed strange in view of that court's treatment of the Government's suit wherein that claim was the very issue sought by the Government to be litigated. The delay caused by the necessary appeal from the District Court's novel decision "of its own motion" (191 F. 2d at p. 519) resulted in the contemporaneous state court

The court forbade counsel for the Government to talk to the Government's own witnesses, even outside the courtroom, for a period (R. 111).* Throughout the trial, it excluded all witnesses for the Government from the courtroom except while testifying and forbade them to talk to each other (R. 108–109, 111, 159–160). As government counsel stated in protest to the court (R. 160), without the advice of his own witnesses during the testimony he was unable effectively to cross-examine the petitioners and their witnesses. The court, however, called this objection "captious" and "pretty small business" and persisted in the prohibition (R. 160–161). No such restrictions were imposed upon petitioners or their counsel.

We submit that this hostile attitude of the District Court, manifest from the beginning, was unwarranted, that it adversely affected the presentation of the Government's case, and that it erroneously influenced the findings and decision. Accordingly, those inflammatory "findings", upon which petitioners base their case here, may not fairly be taken at face value. We submit further, however, that even with those findings petitioners' case must fail as a matter of law.

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action being decided first, settling the title question. Since the Indians' claim was thus adjudicated, no further trial of that issue was appropriate.

* The printed record omits the fact, which appears at page 90 of the typewritten reporter's transcript, that a noon recess intervened between the court's order and its rescission.

III

THE UNITED STATES IS NOT LIABLE FOR THE DESTRUCTION OF PETITIONERS' HORSES AND BURROS BECAUSE IT WAS DONE PURSUANT TO LAW

A. THE TAYLOR GRAZING ACT DOES NOT SO OCCUPY THE FIELD AS TO MAKE THE UTAH STATUTE UNAVAILABLE

As the Court of Appeals held (R. 435), there is nothing in the Taylor Grazing Act indicating that Congress intended that the entire field of law and management of the public domain was to be preempted by the United States. On the contrary, the Act specifically provides that the local law shall not be suspended. The purpose of the Act is to stabilize the livestock industry and to permit the use of the public range by qualified permit holders. It seeks to provide for the most beneficial use of the public range and to protect grazing rights. *Chournos* v. *United States,* 193 F. 2d 321 (C. A. 10), certiorari denied, 343 U. S. 977; *Red Canyon Sheep Co.* v. *Ickes,* 98 F. 2d 308 (C. A. D. C.). It declares in Section 1 (43 U. S. C. 315, *infra,* pp. 68–69), that "Nothing in this Act shall be construed in any way * * * as limiting or restricting the power or authority of any State as to matters within its jurisdiction." In Section 16 (43 U. S. C. 315n; Pet. Br. 53) it preserves the application of "the police power of the respective States" and local statutes "enacted as regards public health or public welfare." The regulations issued under the Act have long

acknowledged the availability of local law by providing for "exercise [of] the proprietary right of the United States in the Federal range, under local impoundment law and procedure" (43 CFR 161.11(b); Pet. Br. 54).

The police power of the state extends over the federal public domain within a state unless Congress has determined to deal exclusively with the subject. *Omaechevarria* v. *Idaho*, 246 U. S. 343; *Colorado* v. *Toll*, 268 U. S. 228; *International Bridge Co.* v. *New York*, 254 U. S. 126; cf. *Garcia* v. *Sumrall*, 58 Ariz. 526, 121 P. 2d 640. It seems evident, in view of the express reservation of the applicability of the police power of the states to the federal range, that Congress did not intend to deal exclusively with such normal subjects of police power as nuisances on the range. The 1927 Utah statute was applicable to the public domain prior to the Taylor Grazing Act of 1934 (R. 42, 434). It has been invoked often since enactment of the Taylor Grazing Act (R. 73, 98, 104, 106, 119–120, 132, 335, 402–403).

Petitioners' attempt to render the Utah statute inapplicable by establishing a conflict with the Taylor Act is unavailing. On this problem they contend (1) that the Taylor Grazing Act gave them grazing rights with which application of the Utah statute interfered (Br. 15–16); (2) that the notice provisions of the Utah statute conflict with the provisions of the Taylor Grazing Act for notice to trespassers (Br. 16–17); (3) that the

state police power exercised under the Utah statute was rendered inoperative by the federal Act, despite the express provision of the latter saving state police powers (Br. 17–22); and (4) that the federal agents lacked authority to invoke the state's police power to clear the range of abandoned horses the presence of which was injurious (Br. 22–24). None of those contentions is correct.

1. The Taylor Act conferred no rights on petitioners. They are not helped by the provisions of the Act and of the Federal Range Code (Secs. 3, 5, 43 U. S. C. 315b, 315d; 43 CFR 161.6(a), 161.2(n)) that preference shall be given in the issuance of grazing permits to "bona fide occupants" of the federal range and that free permits shall be given for "livestock kept for domestic purposes" (permits which are valid "in the immediate neighborhood of the residence of the licensee"). Obviously, occupants whose claims to use the public domain have been properly denied by the United States, as were the claims of these petitioners (*supra*, pp. 3–4, 19–20 (fn. 5); *infra*, pp. 23–25), are not "bona fide" in their continued, defiant occupancy. And the use of horses to herd cattle over a large area of the range for other than domestic uses falls outside the provision for free "domestic purposes" permits, which petitioners neither had nor claimed to have.[1]

[1] Petitioners did not assert any claim to permits under these preference provisions in the courts below. Certainly, the judgment of the District Court cannot be sustained nor

The fact that petitioners were given permits as a matter of grace for a time in the past is not significant. Those permits were revoked for constant violation of their terms (R. 71–73, 101–102, 106). Even assuming any right in petitioners, it was thereby forfeited. For many years prior to the action complained of here, petitioners were told to leave the area for the reservation and were denied permits (R. 21, 30). The boundary lines of a reservation for Navajos are meaningless if the Indians must nevertheless be accorded the right to graze surrounding lands.

Petitioners stand on their assertion of a legal right, based on "ancestral" occupancy, to live on and use this area of the public domain adjacent to the Navajo Indian Reservation. But against this position are the facts (a) that the Navajo Reservation was established by Treaty of June 1, 1868, 15 Stat. 667, as the "permanent home" for "the whole people of said nation or tribe", a treaty by which the Navajos agreed to "relinquish all right to occupy any territory outside their reservation;" (b) that Congress enlarged the reservation along its northern boundary up to, but excluding, the area here in dispute by the Act of March 1, 1933, 47 Stat. 1418; and (c)

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can the administrative officials be charged with dereliction of duty absent any showing that petitioners ever sought or were denied such preferential permits.

[1] Petitioner Bill Hatahley is a member of the Navajo Tribal Council on the reservation (R. 243).

that Navajo Indians, including some of petitioners, have been enjoined from using the area by the decision in *Young* v. *Folornia*, 244 P. 2d 862 (Utah, May 21, 1952), certiorari denied, 344 U. S. 886 (November 17, 1952), which upon a full consideration of the question, held that Navajo Indians have no rights in the area. The United States has always asserted exclusive title to this area since the Treaty of 1868. Thus, the Department of the Interior acted in conformity with treaty, statute and court decision. It lacked power to enlarge the reservation. Rather than abusing its responsibilities, in declining to extend the Navajo domain beyond that given by Congress, the Department properly refused to enlarge the reservation by indirect means.[10]

2. There is no conflict presented by the difference between the notice provisions of the Federal Range Code and those of the Utah statute (Pet. Br. 16–17). The provision of the Federal Range Code, 43 CFR 161.11 (Pet. Br. 54), requiring

[9] That title is not open to adjudication in this tort action. Moreover, the claim of petitioners based on original Indian title (see *United States* v. *Hosteen Tse Ani*, 191 F. 2d 518 (C. A. 10)), was resolved against them when this Court held that original Indian title is not a constitutionally protected property interest as against the United States. *Tee-Hit-Ton Indians* v. *United States*, 348 U. S. 272.

[10] For many years Congress has expressly prohibited the enlargement of reservations or changes in their boundaries except by Act of Congress. Acts of May 25, 1918, Sec. 2, 40 Stat. 561, 570; June 30, 1919, Sec. 27, 41 Stat. 3, 34; and March 3, 1927, Sec. 4, 44 Stat. 1347.

service of written notice upon a violator of the prohibition in the Taylor Grazing Act against the unlawful grazing of livestock is not applicable to the facts in this case. As the Court of Appeals correctly held, that provision relates to violations by specific, known owners and "makes no reference to and has no application whatsoever to a program for the elimination of abandoned stock on the federal range" (R. 434). Contrary to petitioners' assertions (Br. 17, 31–32), the owners of the animals involved here were not known in the sense referred to by the Range Code, which deals with service of written notice "in person or by registered mail" upon a *named* violator setting forth "the act or acts constituting such violation" (Pet. Br. 54). The District Court found that the employees of the Government knew that the horses "belonged to plaintiffs or to some of them" (R. 36). As that finding indicates and as the Court of Appeals stated, the most which the evidence supports is that (R. 432) "It was generally known to those who were rounding up the animals that they belonged to Indians * * *." (See R. 81, 99–100, 120–121, 293–299, 332, 342–348, 345–346, 388.) Some of the petitioners themselves did not know at the time to whom the horses belonged (R. 141–142, 299, 309). They offered no records to sustain their assertion that the animals bore recorded brands (R. 432). A search of the records by government employees showed that no brands

were registered (R. 147, 292–298, 309–310, 333, 432). Petitioners' insistence that the written notice provisions of the Federal regulations are applicable to this case would render elimination from the Federal range of abandoned animals difficult if not impossible as a practical matter in cases, like this, where the officials do not know the specific owners of the individual animals. Petitioners' reference (Br. 21) to previous instances of serving written notice in the case of bands of sheep attended by herders is plainly inapposite.

The sole pertinency of the regulation against specific, known violators is the fact that it shows the policy and practice to invoke local procedures in protecting the range. The Government did not proceed under that regulation. As we have just shown, it was plainly not applicable. Petitioners' insistence that the Government was bound by that regulation to use the local impoundment law relative to "estrays and trespassing animals" is as inappropriate to the situation here as their insistence upon use of the written notice provisions. As the Court of Appeals held (R. 434), the Government was required to proceed against abandoned horses. It used the local law relating to abandoned horses. That law is also an impoundment law. The Government was not required to invoke a law relating to a subject other than that with which it was dealing.

Likewise, the presence in the Taylor Grazing Act and regulations issued thereunder of a penalty of $500 for violations of the provisions of the Act or regulations was not intended to nullify the authorized enforcement of state police power. The $500 fine relates to violations by known persons. As the Court of Appeals held (R. 434), it has no relevancy where it is necessary to proceed "against the livestock."

3. Petitioners' assertion (Br. 22) that there is nothing in the Taylor Grazing Act authorizing the Secretary of the Interior "to rely on state enforcement machinery of any kind in the administration of that measure" is without merit. The Secretary is authorized by the Act to do all things necessary to effectuate the purposes of the Act (Sec. 2, 43 U. S. C. 315a; Pet. Br. 52). The Court of Appeals properly held (R. 434) that that is authority to use existing, customary, orderly procedures. Certainly, under the power expressly reserved to the state, the Secretary could invoke state power to stop a "range war", to prohibit the illegal cutting of forage, or to halt the stealing of cattle. Those matters all have a relation to the orderly control, preservation and administration of the range. The persistent nuisance of abandoned horses and its abatement is in no different category.

4. Contrary to petitioners' contention (Br. 16–22), the police power which the Taylor Grazing Act reserved to the states is not so "narrow"

as to exclude the use of state law in the abatement of the nuisance of abandoned horses on the federal range. As the Court of Appeals said (R. 435): "We find nothing in the Taylor Grazing Act that suggests an intent to suspend local law which is not in conflict with the provisions of the Act or the regulations promulgated thereunder." It has been shown above that there is no conflict with respect to preference rights or notice provisions, as urged by petitioners, and there is certainly no conflict in general subject matter. It is true that the Taylor Grazing Act deals with preservation of the range and control of grazing thereon, and that abandoned horses graze and ruin the range. But that Act does not treat specifically the problem of abandoned animals, and there are attributes of such animals which have caused them to be dealt with in a different way from other trespassing animals. There is no owner to proceed against. Abandoned animals are totally uncontrolled, unlike animals in which an owner, even though a trespasser, has an interest. They constitute a greater menace to health by infectious diseases and to property by entering enclosures and roaming wherever they will, both on and off the open range. By the very fact of their abandonment, they generally have undesirable attributes (which they may pass on by contagion or breeding) or are otherwise worthless. The State of Utah has treated them as a serious type

of nuisance, along with brothels (Br. 23), and has declared them to be "a public menace" and condemned them as such (R. 436). The abatement of such a nuisance is an exercise of the state's policy power in the "narrow" sense as defined by petitioners. Accordingly, even under petitioners' own theory, the action here was authorized by the Taylor Grazing Act.

The decisions relied upon by petitioners (Br. 19–21) are not contrary to that of the Court of Appeals in this case. *Noh* v. *Babcock*, 21 F. Supp. 519 (D. Idaho), reversed, 99 F. 2d 738 (C. A. 9), merely held that, after the Taylor Grazing Act, Idaho could no longer control the relative amounts of grazing between sheep and cattle on the federal range. *Northern Pac. Ry. Co.* v. *North Dakota*, 250 U. S. 135, held that the state could no longer control intrastate railroad rates after seizure by the United States under an act which, although reserving to the state "taxation and lawful police regulations," expressly authorized the President to fix such rates. *Dakota Cent. Tel. Co.* v. *South Dakota*, 250 U. S. 163, held that, notwithstanding the same reservation to the state, it could not control local telephone rates after seizure by the United States under a statute which, the court held, gave "a right in the President to take complete possession and control to enable full operation of the lines" and embraced "the entire business and the right to the entire revenues" (pp. 184–185). In those cases,

the full purposes of the statutes could not be accomplished without exclusive federal control over the subject matter involved.

B. THE PROVISIONS OF THE UTAH STATUTE WERE FOLLOWED

1. *The Board of County Commissioners of San Juan County authorized the elimination program.*—Here again, in conformity with its conviction that the Federal Range Code was not followed because of a calculated plot to destroy the Indians, rather than, as shown, because it did not apply, the District Court saw ulterior motives in each step of the procedure which was followed under the Utah statute. This attitude resulted in findings and conclusions adverse to the Government which derive only from making small irregularities meaningful and of large consequence when the plain fact is that, even viewed as the court desired to view them, they could not have advanced the plot which the court found. The findings and conclusions are contrary to a reasonable view of the facts taken as a whole and overlook entirely the presumption of regularity of official acts done and approved here by the agencies of two governments. *Great Northern Ry.* v. *Washington*, 300 U. S. 154, 161.

The District Court held that the round-up and elimination of the horses and burros was not in accordance with the Utah statute because no resolution authorizing it "was ever passed" (R. 42). This was based upon a finding that the matter

"was not considered at any meeting of said Board except at its meeting of September 2, 1953 [1952], after the notices had been published" and upon a conclusion that the resolution appearing in the minutes of that meeting was "a statement, not amounting to a resolution," and "was no more than a belated and ineffective attempt to endeavor to shield defendant from the consequences of its own unlawful acts" (R. 32, 42–43). The court further relied upon the fact that the Advisory Board, named in the resolution as the agency engaged to carry out the elimination program, did not officially approve the activity until October 9, 1952, after a number of the horses had been killed (R. 43).

The sole factual basis for those findings and conclusions relative to the actions of the Board of Commissioners was that the minute of the Board's meeting of July 1, 1952, do not show that a resolution authorizing the program was passed on that date and that the date of July 9, 1952, on the resolution appearing in the minutes of the meeting of September 2, 1952, was a date on which there was no meeting (R. 30–34, 42–43, 370–371). It may be conceded, as the Court of Appeals noted (R. 436), that the procedure of the Commissioners in this Utah county does not measure up to the strictest parliamentary practice, but it does not follow that there is any basis for doubt as to what they intended and what they did, nor is there any support for the District

Court's charge of intentionally devious practice. Two of the three Commissioners and the county clerk whose duty it was to keep the minutes testified that the fact that a resolution does not appear in the minutes was due merely to an oversight (R. 148–154, 358–390). The evidence shows that at least three resolutions authorizing the elimination of abandoned horses from this area had been adopted, in 1944, 1947, and 1950, which had not been rescinded and which, it was believed, made an additional one unnecessary, so that all that had to be done was the posting of notices (R. 73, 104, 106, 132, 375, 384–386, 403, 415). Such an elimination program was not an unusual event. It was customary and frequent (R. 98, 104, 106, 119–120, 132). Even so, the undisputed evidence is that the Commissioners unanimously approved, voted on and "passed" a new resolution on July 1, 1952, like "the same resolution that had been passed before," and directed Dale Kinnaman (the Range Manager) and the County Attorney to draw it up in that form (R. 358–359, 375–376, 383, 385–386). Contrary to the District Court's ruling (R. 43, 415), this was not an improper delegation of the Commissioners' authority. The standard was fixed and clear. The resolution was put in writing by the persons designated and was signed by each Commissioner individually on July 9, 1952 (R. 91, 372, 386–387). As the Court of Appeals stated (R. 436), "the record discloses that positive action was taken by the Board in a regular

meeting. The fact that the Board later sought to complete its minutes by inserting a resolution therein would not affect the validity of its previous action."

On the following days, notices of the program, signed by the county clerk (R. 153), were posted and published in exact conformity with the Utah statute. (R. 33, 78–79, 86, 97–98, 111–112, 306–307). The Board of Commissioners paid for the publication of the notices (R. 79, 152–153). The notices were in the English language a fact which the District Court noted disapprovingly (R. 33)—but all prior programs had been noticed in English with the result that most Indian horses promptly disappeared, and that was the case this time (R. 73, 106, 132–134, 335–338). In addition to the written notices, Dee Black testified that "in August and September of 1952, I went down there pretty near continuously in those months, telling the Indians and traders that there was going to be a horse round-up * * *. I have been to Sakezzie's camp several times and told them. * * * Told Jim Hatahley" (R. 133).

After the notices had been posted and published, but before any horses had been rounded up or killed, the Commissioners unanimously voted to insert the resolution in the minutes at the regular meeting of September 2, 1952, to cure the prior oversight in the minutes (R. 32–33, 148–151, 359–361). This was not a mere "statement, not amounting to a resolution" (R. 43). It

was in the form of and entitled a "Resolution" (R. 32). Certainly, it is not reasonable to say that the Commissioners inserted such a document in the minutes without meaning it to be a resolution.

Nothing in the foregoing facts or sequence of events supports the District Court's charge of a vicious plot or its finding that the round-up was not properly authorized under Utah law. Notices were timely posted and published so that it was known to all what was intended. Nothing could have been gained by the manipulation which the court conceived respecting the resolution.

Moreover, even taking the court's own view that there had been no discussion or resolution passed on July 1, 1952, the resolution of September 2, 1952, ratified the posting of notices. This was not too late. The Utah statute, not the resolution, created the offense. By the terms of the statute (Section 3, Pet. Br. 56), these horses were "condemned" before the resolution was passed. No right which the statute was designed to protect was infringed by the events which then took place. The world was notified and the Indians were specifically notified. More than the required time elapsed between the notification and the round-up. Nothing more would have been done if the resolution had been reported in the minutes of July 1, 1952.[11] It cannot be disputed

[11] Petitioners' insistence on strict compliance with such a technicality contrasts vividly with their rejection of any legal provision unfavorable to their position. For example,

that the program of eliminating the horses was at all times intended and approved by the Commissioners. Similarly, contrary to the conclusion of the District Court (R. 43), there is no question that the Advisory Board, the agency designated by the Commissioners to conduct the program, approved the action taken. As the Court of Appeals stated (R. 430), the Bureau of Land Management officials asked the Commissioners to inaugurate the program upon recommendation of the members of the Advisory Board (R. 102, 107–109, 113). Moreover, the Advisory Board ratified the action on October 9, 1952 (R. 55, 93), paid some of the expenses (R. 81, 346–347), and, in return, received the money from the sale of the horses as provided by the Commissioners' resolution (R. 32, 81, 94).

It is thus evident that the real ground for condemnation by the District Court of the proceedings under the Utah abandoned horse statute was not these technical deficiencies but its assumption as to the reasons motivating the actions of the members of the Commission and the Advisory Board. This was pure speculation since the facts relied on have no real tendency to discredit the good faith of those persons in their attempted invocation of the statute.

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they refused to comply with the redemption provisions of the Utah statute, with the provisions of the Taylor Grazing Act regarding use permits, and with the state court injunction against further trespassing in the area.

2. *The horses and burros were abandoned within the terms of the Utah statute.*—Petitioners rely on findings by the District Court that the horses bore recorded brands and that the ownership of these horses was known. They contend, therefore, that the Utah statute concerning abandoned horses could not properly be invoked (Br. 31–33). The contention lacks merit. The findings by the District Court contain express qualifications which prevent their supporting the conclusion urged, and the evidence would not support unqualified findings that there were recorded brands and a knowledge of ownership. Moreover, as the Court of Appeals held (R. 437–438), even if there were recorded brands and a knowledge of ownership, the petitioners were required to follow a prescribed procedure to identify and reclaim their animals, which they did not do; accordingly the "actual knowledge of the ownership * * * is not material and the Utah statute is clear on the subject."

An abandoned horse or burro is defined by the Utah statute (Section 1, Pet. Br. 55) as follows:

> * * * any * * * animal of the genus equus, unbranded, or if branded, that has escaped assessment for taxation for the year next preceding the killing of such animal as hereinafter provided for, and running at large upon the open range of this state, and includes a foal running with a dam coming within the above definition. An animal not

> bearing a decipherable brand recorded in the office of the recorder of marks and brands shall be deemed unbranded.

The statute presumes that such an animal may have an owner by providing detailed procedures for the "owner to reclaim it" (R. 436–437). Title 3, Chapter 5, Section 115, Utah Code Annotated (1943), *infra*, pp. 70–71, requires branding and the recording of brands, and Section 116 provides: "It is unlawful to brand and mark any livestock in this state with a brand and mark unless such brand and mark is recorded." Sections 122 and 123, *infra*, p. 71, provide that the owner shall keep a certified copy of the recordation and that such copy "shall be prima facie evidence of the ownership of such animal or animals * * * and shall be taken as evidence of ownership in all courts of law or equity or in any criminal proceedings when the title to the animal is involved or property to be proved."

Petitioners alleged in their complaint that the animals sued for were owned by them and "were plainly marked and branded" (R. 6). The Government denied those allegations (R. 9). In addition, it set forth the Utah statutes relative to branding, recording and elimination of abandoned horses as justification for the action taken (R. 10–15).

At the trial, petitioners testified that the animals were branded and that the brands were recorded

(R. 201, 246, 252).[12] The Government's witnesses testified that only a few were branded and that a check of the records showed that none of the brands were recorded (R. 147, 293, 294, 295, 297, 298, 309–310, 333). The District Court found as a fact that the animals "were plainly branded, and some of the brands thereon were duly recorded" (R. 38). But in its conclusions of law it went further, stating that they "were not unbranded, but they were branded and with brands recorded and decipherable" (R. 44).

We submit that this state of the record provided an insufficient basis upon which to charge the Government with unlawful conduct. The *ipse dixit* of the petitioners that the animals were branded and that the brands were recorded is meager proof of the fact when records are available and required by law. It cannot reasonably sustain their case or overcome the defense by the Government under the Utah statute.

The Government—though, of course, the burden of proof was upon petitioners—produced oral testimony that the animals in question bore no brands or unrecorded brands. *Supra*, pp. 26–27, 39. Petitioners were permitted to prevail upon a mere counter-assertion, when the records they claimed to exist would have been readily available

[12] Petitioner Bill Hatahley acknowledged that some of his animals carried brands used only on the reservation (R. 246). A search by an Indian Service official and Dee Black showed that such brands were "not registered" (R. 310).

and would have been conclusive. Indeed, petitioners conceded that the owner's certified copy of the recordation of the brand is the best evidence (Br. 32), and it was only because the Government did not object that the oral testimony of petitioners was even admitted. Against the state, under the authority of which the round-up was conducted, a showing of recorded brands was necessary because by the foregoing statutes a horse on the open range without a brand or bearing an unrecorded brand is declared condemned and the owner is in violation of the law. A full showing of compliance with state law was particularly important here if petitioners were to avoid resting on an unlawful status as the basis of their claim against enforcement of state law dealing with that very status. Petitioners did not sustain the burden of proof required.

The error of permitting such meager proof to overcome the Government's defense under the Utah statute is shown by the fact that the ruling, in practical effect, nullifies that statute. Sections 4 and 6 of the statute place the burden upon all owners of horses running on the open range to establish ownership by furnishing a description of all their horses "and the brands or marks thereon." (Pet. Br. 57, 58). The notices in this case announced that requirement (R. 31). It was not complied with by petitioners. Under the ruling of the District Court, a mere assertion of branding and recording can render a program

of elimination of abandoned horses under the statute illegal and tortious. The ruling misplaces the emphasis of this statute and other statutes of Utah dealing with the subject of branding by putting the alleged owner, rather than the state, in a favored position with respect to proof. It accords nothing to the presumption of the regularity of official acts. It seriously minimizes the importance of branding of animals on the wide ranges of the west.

The District Court's finding, upon which petitioners rely (Br. 31), that the agents of the Government knew to whom the horses belonged was not unqualified. It found that they knew the horses "belonged to plaintiffs or to some of them" (R. 36). We have shown, *supra*, p. 26, that the Court of Appeals correctly regarded that finding and the evidence on which it was based as establishing only that the agents of the Government knew that some of the horses which were roaming the range doubtless belonged to some Indians.

The Court of Appeals was further correct in ruling that the Utah statute does not require that any inquiry be made as to ownership (R. 437–438). It is evident that such a burden upon the enforcement officials in this extensive country would probably defeat use of the statute. The notice provision (Section 4, Pet. Br. 56–57) and the repossession provision (Section 6, Pet. Br. 58) are explicit in requiring the owners, after the notice and advertisement, to initiate a prescribed

procedure to protect their interests. It is noteworthy that the agents here went beyond the requirements of the statute in personally advising petitioners in advance of the round-up to protect their interests (R. 133). Dee Black made a special effort to return horses to two Navajos (R. 144-145, 299). The horses of several Ute Indians were returned (R. 83, 89, 117, 142, 144). These facts contrast significantly with the District Court's repeated assertion that "The plan was to leave no live horses whatever in the ownership or possession of plaintiffs or others of their band of Indians" (R. 33–35, 42–45).

Similarly without support is the District Court's assertion that it was intended "to get the horses killed or out of the County as rapidly as possible to avoid the possibility that plaintiffs should find them and take possession of them, much less to make any endeavor whatsoever to return these animals to their owners" (R. 33–34, 44). The statute provides for the killing of such horses (Sections 1 and 5; Pet. Br. 55, 57). The animals were not removed from the county rapidly, but were held in corrals for periods as long as two weeks (R. 135, 136). They were gathered from the range gradually over the period from September 19, 1952, to the institution of this suit on March 20, 1953 (R. 7, 29, 72, 82–83). Petitioners watched many of them being "trucked past the trading post" throughout that period (R. 195, 261, 270).

C. THERE WAS NO DENIAL OF CONSTITUTIONAL PROTECTIONS

Petitioners argue (Br. 34 *et seq.*) that even if "the provisions of the Utah abandoned horse statute were fully complied with," its application to them in this case was unconstitutional. Postponing the obvious point that an unconstitutional exertion of state authority could scarcely warrant the imposition of liability upon the Federal Government (see *infra*, pp. 47–53, 56–57), we note here that the argument was in any event properly rejected by the court below.

The claim that "the notice prescribed by the Utah statute was so inadequate as to amount to a deprivation of due process" (Pet. Br. 34) is without factual substance. As we have shown (*supra*, pp. 5–6, 19, 23–25, 33, 34, 41–42), petitioners had ample notice from Dee Black, from observing the round-up, from the statutory notices, from prior court action and from repeated warnings for several years. The decisions relied upon by petitioners contain no such record of actual notice as that present in this case.[13]

The record does not support petitioners' charge of discrimination against them (Br. 39–41). The fact that they were not given permits after 1946 because of their refusal to abide by the terms of

[13] Petitioner Hosteen Sakezzie testified to actual notice as follows (R. 181): "Yes, my horses were in the corral during the day, because he may be picking up horses right along through those areas. I put my horses in the corral during the day, and put them out to feed in the night time, when everything gets quiet."

the prior permits, *supra*, pp. 23–24, is not unjustified discrimination. The fact that only 11 horses belonging to white owners were killed (R. 120) may be explained by the smaller number of such horses loose on the range without authority and by obedience to the notices of the round-up. Petitioners made no attempt to follow the redemption provisions of the statute. The assertion of discrimination (Br. 40–41; R. 34–35), in that five horses were returned to white owners while no effort was made to learn the ownership of the Indian horses or to return them, is made without any recognition of differences in compliance with the procedures of the statute.

Similarly, as to the differences in the fees charged, the statute fixed the fee upon repossession as "the expense of caring for the [horse] from the date of capture." Petitioners' reliance on the District Court's statement (Br. 40–41; R. 35) that the return of five horses to white owners for a fee of $2.50 per head contrasted significantly with the charge of $60 per head for horses of one of petitioners is without supporting basis in the evidence as to time, distance, feed, or other possible elements of expense making the two situations comparable. Moreover, apart from the Utah statute, this statement overlooks the charges made to all for use of the federal range (R. 128, 311).

Finally, petitioners' charge of discrimination is based upon their own failure to follow the re-

quirements of both Federal and State law, and licence cannot justify the judgment of the trial court holding the Government liable in tort. Petitioners, merely because they are Indians, cannot claim exemption from the laws applicable to other citizen graziers.

III

IN ANY EVENT, PETITIONERS' OBJECTIONS TO INVOCATION OF THE STATE'S POLICE POWER TO CLEAR THE RANGE OF INJURIOUS ANIMALS PRESENT NO BASIS FOR HOLDING THE UNITED STATES LIABLE UNDER THE FEDERAL TORT CLAIMS ACT

The Court of Appeals has unanimously held that the actions of the range officers in this case, under the aegis of the state police authority they invoked to help take care of the range, were in all respects lawful—that it was proper to seek the aid of the state's police power and that this power was lawfully employed. Devoting the bulk of their brief to this holding, petitioners necessarily recognize that, if correct, it disposes of their claim at the threshold.

But even if petitioners were to prevail on this point—even if they could show that the range officers and the Court of Appeals erred in believing that the Utah statute was lawfully applicable and applied in this case—the result would not be a claim cognizable under the Federal Tort Claims Act. For petitioners are faced at this point with the following dilemma: If the conduct of which

they complain was within the range officers' scope of employment—as we believe it was, and as petitioners must, of course, show at the outset to invoke the Tort Claims Act (28 U. S. C. 1346 (b))—then the intentional conception and execution of the plan to employ the state's police power is the kind of action for which neither the Government's employees directly nor the Government derivatively may be held liable under general law or the Tort Claims Act. *Gregoire* v. *Biddle,* 177 F. 2d 579 (C. A. 2); certiorari denied, 339 U. S. 949; *Dalehite* v. *United States,* 346 U. S. 15, 59–60 (dissenting opinion). And this is so whether the execution of the operation be viewed as state or as federal action (cf. opinion below, R. 433, fn. 4). If, on the other hand, the actions were, as petitioners sometimes seek to show, wholly unlawful and unauthorized, and "wanton and willful" (Pet. Br. 45), to boot, the suit must fail because such actions would fall outside the scope of the employment of government agents.

A striking ambiguity in petitioners' arguments in this Court reflects this dilemma. In their petition for certiorari (p. 2, fn. 2), they observe, citing a concession they not only accept but insist upon (R. 64), that there is "no question here as to the authority of the Government agents to take the action complained of by petitioners." Thereafter, however, they never undertake to make—we think they could not make—a showing, essential to their case, how the very action these Gov-

ernment agents were authorized to take could be tortious, *i. e.*, "negligent or wrongful" within the Tort Claims Act. Instead, in both their petition and their brief on the merits they devote themselves wholly to arguing that the actions were not authorized and could not have been authorized. Here, again, their contentions of deliberate "taking and destruction" lead them directly outside the Tort Claims Act.

1. If, as petitioners correctly stated in their petition for certiorari, the Government's agents were authorized to take the action which has been made the basis for this suit, it is difficult to see how this action may be deemed "negligent or wrongful" under the Tort Claims Act. There is, of course, no assertion of negligence; the alleged tort is said to exist because the range officers deliberately and purposefully did what they did. And the additional word "wrongful" in the Act, designed only to eliminate doubt in a relatively small penumbral area which "negligent" might not have covered (*Dalehite* v. *United States*, 346 U. S. 15, 45), can scarcely apply to intentional actions a government employee may lawfully take, even assuming it could extend in any case to the intentional tort of conversion. On petitioners' own statement of their position, therefore, this would seem to be a situation in which both the majority and dissenting Justices in *Dalehite* would apply the exception in 28 U. S. C. 2680 for "governmental functions" (majority,

(p. 32) or an exertion of "governmental authority in a manner which legally binds one or many" (dissent, p. 59).

Thus, the Court in *Dalehite* said (pp. 32–33):

> One only need read § 2680 in its entirety to conclude that Congress exercised care to protect the Government from claims, however negligently caused, that affected the governmental functions. Negligence in administering the Alien Property Act, or in establishing a quarantine, assault, libel, fiscal operations, etc., was barred. * * * [Section 2680 (a)] excepts acts of discretion in the performance of governmental functions or duty "whether or not the discretion involved be abused." Not only agencies of government are covered but all employees exercising discretion. It is clear that the just-quoted clause as to abuse connotes both negligence and wrongful acts in the exercise of the discretion because the Act itself covers only "negligent or wrongful act or omission of any employee," "within the scope of his office" "where the United States, if a private person, would be liable." 28 U. S. C. Sec. 1346 (b). The exercise of discretion could not be abused without negligence or a wrongful act.

Elsewhere, the Court noted that Congress intended "to assure protection for the Government against tort liability for errors in administration" (pp. 26–27), to preclude "liability arising from

acts of a governmental nature or function" (p. 28), and "that acts of subordinates in carrying out the operations of government in accordance with official directions cannot be actionable" (p. 36)." And the exception, the Court said (p. 35), "includes more than the initiation of programs and activities."

While the Court divided in *Dalehite*, the area on which majority and dissent agreed seems sufficient to show that a government employee intentionally taking action of this type he is authorized to take commits no tort for which either he or the Government may be sued. The dissenting opinion said (pp. 59–60 [footnotes omitted]):

> When an official exerts governmental authority in a manner which legally binds one or many, he is acting in a way in which no private person could. Such activities do and are designed to affect, often deleteriously, the affairs of individuals, but courts have long recognized the public policy that such official shall be controlled solely by the statutory or administrative mandate and not by the added threat of private damage suits. For example, the Attorney General will not be liable for false arrest in circumstances where a pri-

"It may be recalled in this connection (see pp. 5, 33, *supra*) that the Utah abandoned horse statute had been invoked repeatedly at earlier times and in other places than those involved here. This course of proceeding plainly reflects departmental judgments higher than those of the particular range officers whose conduct is now in question.

vate person performing the same act would be liable, and such cases could be multiplied. The official's act might inflict just as great an injury and might be just as wrong as that of the private person, but the official is not answerable. The exception clause of the Tort Claims Act protects the public treasury where the common law would protect the purse of the acting public official.

Taking only this narrower view of the exemption, we think it makes clear that petitioners have no claim under the Tort Claims Act for the actions which they themselves recognize to have been "authorized." The range manager in this case was unquestionably charged with the duty of protecting and controlling the use of the range embraced within Grazing District No. 6. When confronted with the presence of hundreds of horses whose owners had unlawfully left them to roam the range, his duty plainly required action to remove them. As part of his official responsibility, he determined that a Utah statute and Utah official action could lawfully and effectively be invoked for this purpose, and the Court of Appeals for the circuit which includes Utah has unanimously agreed with him.

But if the range manager and the Court of Appeals erred, it by no means follows that petitioners have a claim upon which relief can be granted under the Tort Claims Act. On the contrary, the line of cases approved in the

Dalehite dissent (346 U. S, at 59, fns. 15 and 16) marks out the clear barrier to this suit. Those cases show that, at least where an official is acting nonministerially and "within the scope of his powers" (see *Gregorie* v. *Biddle*, 177 F. 2d 579, 581 (C. A. 2), certiorari denied, 339 U. S. 949), a mistake of law or fact in the exercise of these powers affords no basis for a tort action against the official. The immunity applies, not only where property is injured or destroyed, as here (*e. g., Otis* v. *Watkins*, 9 Cranch 339), but even where the official action effects bodily harm or restraint which would plainly be tortious if caused by a private individual (*e. g., Gregoire* v. *Biddle*, *supra*; *Wilkes* v. *Dinsman*, 7 How. 89). Because of the deep-rooted public policy which precludes efforts to reexamine governmental decisions in tort suits, the rule has been held applicable even where the action complained of is taken "maliciously and wilfully," "from personal spite," and with "no legal warrant." *Gregoire* v. *Biddle*, *supra*, at 580. And "[t]he exception clause of the Tort Claims Act protects the public treasury where the common law would protect the purse of the acting public official." *Dalehite*, *supra*, at 60 (dissenting opinion); see also *Feres* v. *United States*, 340 U. S. 135, 141.[15]

[15] Many decisions in addition to those we have cited support the doctrine of official immunity discussed in the text. *Kendall* v. *Stokes*, 3 How. 87; *Spalding* v. *Vilas*, 161 U. S. 483, 498–9; *Standard Nut Margarine Co.* v. *Mellon*, 72 F.

Insofar as the immunity requires that the conduct in question be within the general scope of the official's powers, this obviously cannot aid the petitioners. In the first place, the requirement is satisfied by petitioners' acknowledgment that the range officers had been authorized to do what they did in this instance and numerous others. Moreover, this premise is a necessary condition at the very outset of petitioners' action to recover in tort for acts of a government employee "while acting within the scope of his office or employment" (28 U. S. C. 1346 (b)). See pp. 54–57, *infra*. And it is clear, in any event, that the immunity is not destroyed at the only point where it ever becomes relevant—namely, where the officer or employee has erred and has thus overstepped the bounds of his lawful authority.[16]

2d 557 (C. A. D. C.), certiorari denied, 293 U. S. 605; *Glass* v. *Ickes*, 117 F. 2d 273 (C. A. D. C.), certiorari denied, 311 U. S. 718; *Cooper* v. *O'Connor*, 99 F. 2d 135 (C. A. D. C.), certiorari denied, 305 U. S. 643; *Lang* v. *Wood*, 92 F. 2d 211 (C. A. D. C.), certiorari denied, 302 U. S. 686; *Burns* v. *Spiller*, 161 F. 2d 377 (C. A. D. C.), certiorari denied, 332 U. S. 792; *Laughlin* v. *Garnett*, 138 F. 2d 931 (C. A. D. C.), certiorari denied, 322 U. S. 738; *Phelps* v. *Dawson*, 97 F. 2d 339 (C. A. 8); *Yaselli* v. *Goff*, 12 F. 2d 396 (C. A. 2), affirmed, 275 U. S. 503.

[16] The immunity is not destroyed because the injury of which the plaintiff complains may amount to a deprivation of constitutional rights. *Gregoire* v. *Biddle*, *supra*. And see the exclusion from the Tort Claims Act of any claim "based upon an act or omission of an employee of the Government, exercising due care, in the execution of a statute or regulation, *whether or not such statute or regulation be valid* * * *." 28 U. S. C. 2680 (a) (emphasis added).

In short, the central point of petitioners' case—that though authorized to act as they did, the range officers guessed wrong as to the effect of the Taylor Act on Utah's police power or acted in accordance with legally imperfect state procedures—defines a clear instance where the tort recovery they seek is unavailable. The legitimacy of the assertedly wrong determination is reflected in the decision of the court below, which found the administrative judgment and action lawful, and so had no occasion to go further. But if this Court should disagree with that limited ruling, there remains the obstacle that the Tort Claims Act does not authorize suit against the United States on the ground that a government agent mistook his legal powers in deliberately choosing the means for performance of a duty of the calibre of the responsibility for keeping the range clear.[17]

Petitioners argue (Br. 34 *et seq.*) that, assuming "the provisions of the Utah abandoned horse statute were fully complied with," it was nevertheless unconstitutional in its application to them. It would be difficult to find a clearer case of state action than the one presented in this argument, so that, even apart from cases like *Gregoire* v. *Biddle*, any supposed basis for a claim against the Federal Government is lacking. Cf. pp. 56–57, *infra*.

[17] The area of official immunity on which all members of the Court agreed in *Dalehite* does not appear to be affected by the recent decision in *Indian Towing Co.* v. *United States*, 350 U. S. 61. In this later case, where the alleged tort was one of negligence, the Government conceded that the "discretionary function" exception in 28 U. S. C. 2680 (a)—in the sense in which it was applied in the first part of the

2. While much of their argument goes to the asserted legal errors of the range officers, petitioners also describe the conduct for which they sue (as did the District Court) as having been part of a deliberate, "preconceived plan" (Br. 8), executed by "wanton and willful" acts (Br. 45), to force the Indians off the range. These characterizations leave intact, we believe, the immunity already discussed. See *Gregoire* v. *Biddle, supra*, p. 51. However, insofar as the unning theme in petitioners' argument claims wanton and malicious conduct, evilly motivated, and heedless of the bounds of official duty and authority, this premise too is inconsistent with recovery under

Dalehite majority opinion—was inapplicable (see 350 U. S. at 64), but argued for a "governmental function" exception on the ground that the activity in question (lighthouse keeping) was not one performed by private persons, so that the suit did not meet the provision in 28 U. S. C. 2674 that the Government's liability is to be like that of "a private individual under like circumstances * * *." Cf. *Feres* v. *United States*, 340 U. S. 135. This Court recognized that the decision whether to operate a particular light was an exercise of discretion (p. 69), but held that, once undertaken, the activity required due care at the risk of liability under the Tort Claims Act. Here, by contrast, it is the very undertaking of the activity which is asserted to be tortious—*i. e.*, the intentional taking of regulatory action where there was authority "to take the action complained of" (Pet. 2, fn. 2). Under both *Dalehite* and *Indian Towing*, this falls within the exception in Section 2680 (a) for "the exercise or performance * * * [of] a discretionary function or duty on the part of a federal agency or an employee of the Government, whether or not the discretion involved be abused."

the Tort Claims Act. For though an individual happens to be a government officer or employee, his deliberate undertaking of a wholly unauthorized venture to the injury of others, unfounded in any real or supposed official authority, could scarcely be deemed to be "within the scope of his office or employment," as the Tort Claims Act requires.

At least in Utah, where the events in this case occurred,[18] it seems clear "that a principal is not liable for the willful tort of an agent which is committed during the course of his employment unless it is committed in the furtherance of his employer's interests or unless the employment is such that the use of force could be contemplated in its accomplishment." *Barney* v. *Jewel Tea Co.*, 104 Utah 292, 296. Stated otherwise, the familiar rule enforced in Utah is that "if the agent go beyond the range of his employment or duties, and of his own will does an unlawful act injurious to another, the agent is liable, but the master or employer is not." *Sweatman* v. *Linton*, 66 Utah 208, 213. Though we have urged that they are mistaken in this, much of petitioners' argument is designed to show that the conduct of which they complain falls within the foregoing description. If they were right, and even assuming the official immunity discussed above might be unavailable to the individual officers themselves,

[18] Local law is controlling on this point. *Williams* v. *United States*, 350 U. S. 857.

this suit against the United States would fail for want of a basis for *respondeat superior* liability.[19]

Another avenue leads to the same conclusion. Petitioners contend that the range officers had no authority to invoke Utah's abandoned horse statute.[20] It is a fact, however, that the range officers did so and that, as the court below held, the round-up and disposition of the horses were conducted under the direction and asserted authority of the Board of County Commissioners. If, as petitioners claim, the federal range officers lacked federal authority to place themselves in this role, it follows once more that they were outside the scope of their federal employment. Similarly, any supposed departures by the County Commissioners from the procedures prescribed for enforcing state law would appear to be state rather than federal action. Accepting petitioners' views, the range officers were, without federal authority, acting in effect as deputies of the state. Under

[19] The exception from the Tort Claims Act of a whole series of intentional torts involving malice and wilfulness (see 28 U. S. C. 2680 (h)) shows that Congress did not conceive of wanton and wilful misconduct of government employees as within the scope of their employment.

[20] To the extent that the mere fact of calling upon Utah's law and officials for assistance is in itself an asserted basis of liability, the claim would appear to be defeated by the exception in the Tort Claims Act for claims based upon malicious prosecution or abuse of process. 28 U. S. C. 2680 (h). Of course, petitioners rest mainly, not on the invocation of state power, but on what was done thereunder, a matter on which the discussion which follows is pertinent.

the Tort Claims Act, as under tort law generally, an employee is outside the scope of his employment when he is thus engaged in the business of another. *Sanchez* v. *United States*, 177 F. 2d 452 (C. A. 10); *Fries* v. *United States*, 170 F. 2d 726 (C. A. 6), certiorari denied, 336 U. S. 954; *Gleason* v. *Salt Lake City*, 94 Utah 1.

IV

ASSUMING LIABILITY, THE DAMAGES AWARDED BY THE DISTRICT COURT ARE EXCESSIVE

Though it absolved the Government of liability and thus had no occasion to consider any question of damages in detail, the Court of Appeals pointed out (R. 433) "that the amount of the judgment appears to be more for punishment because of the methods used in eliminating the animals, rather than for the damages suffered * * *." It seems clear upon consideration of the record that this observation was fully justified and that the prohibition against holding the United States liable for punitive damages (28 U. S. C. 2674) was transgressed by the District Court.

In its computation of damages, the District Court said it was weighing the value of the horses, consequential losses, and mental pain and anguish (R. 39–41). Reflecting the lack of any attempted precision in this computation, the award was in a lump sum of $100,000 (R. 47, 50). There was no finding as to the amount

awarded for each element of the damages allowed. There was no amount awarded to each petitioner. Although each petitioner suffered a different amount of each element of the damages allowed, no basis was furnished for arriving at the award in that respect or for apportioning the award among the petitioners. All the damages were premised upon "intentional, wanton, malicious acts of defendant" (R. 41). We submit that these damages are based upon erroneous considerations and are excessive for the following reasons:

1. *The horses and burros.*—The Government adduced the following evidence as to value: Fifteen horses were sold locally to individuals at prices from $5 to $30 each (R. 144, 333–334). The rest of the horses and burros were sold to the Kuhni Packing Company at the going rate of from 1 1/15 cents to 3 cents per pound delivered (R. 93, 140–141, 142–146, 293–296). This was done after inquiry revealed that it was the highest price obtainable for immediate sale (R. 139–140, 146, 338–339).[a] There were many horses, of the same type and better, available for sale at the time (R. 339). The value of such horses as these is from $5 to $25 (R. 381, 397). The

[a] The Utah statute relative to eliminating abandoned horses requires use of the "most effective and economical" means and authorizes sale of the horses (Section 5). It provides that if an owner has furnished a description of a horse and it is, nevertheless, killed, he "shall receive as damage therefor a sum not exceeding $10 for each animal; *pro-*

District Court expressly excluded this evidence from its consideration, both at the trial and in the findings, because of its erroneous conviction that a plot existed to destroy the petitioners' property, including an advance intention that if they "were able to recover anything the measure of damage would be the glue factory price which defendant would receive for the horses" (R. 33–34, 38, 43–46, 185, 219–227, 269, 283, 338).

In its findings the court considered only the highest evidence adduced by the petitioners, namely, that horses were traded among the Indians for the equivalent of $900 to $1,050 per head,[22] that the rental value of horses "within the State of Utah" is $5 per day, and that the cost of replacing these animals would be $1,000 each[23] (R. 39–40).

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vided, that he has paid all taxes assessed against said animal; *provided further*, that payment of such claims may be made only from proceeds of sales of captured horses" (Section 6). The resolution of the County Commissioners here provides that the Advisory Board "shall pay all costs incident to the removal of said horses" and that all horses "shall become the property of the said Advisory Board" (R. 32). It may be presumed from this that abandoned horses are not generally of much value and that some effort was made to receive a fair value for the horses.

[22] Computed on the basis of trading five cows worth $200 each or from 30 to 35 sheep worth $30 each for one horse.

[23] Computed on the basis of buying a white man's brood mare at the highest cost testified to, keeping it in a corral because of the tendency of such animals to return to their birthplace unless restrained, and feeding it and its colt on hay at $40 a ton for five years (R. 36–40, 241–242, 285–286, 328, 412).

The court's figures of $900 to $1,050 as the trading value of each horse ignore the fact that the very witness, Sakezzie, who testified to those figures stated unequivocally in response to the court's own questioning that the average value of the horses involved here was $300 per head and that he would have sold his horses for that (R. 283–289). The court's figure of $5 per day for renting a horse is the price charged white deer hunters and recreation seekers, includes the saddle, and was testified to by a witness who had "never rented any horses out in that part of the country." (R. 324, 327, 329–330). The figure of $1,000 for replacing a horse is not a proper consideration under the evidence in this case and, without additional facts, it is an insufficient basis for value. Consideration of that sum assumes, against reason and without any evidence on the matter, that the petitioners can be made whole only by replacing every horse and burro, regardless of age or fitness, with a young horse having a long expectancy of usefulness. In addition, it necessarily assumes that there is no market value available. Market value is the required measure of damages for the destruction of personal property in a tort action unless "for special reasons, it is not exact, or otherwise not applicable." 15 Am. Jur. *Damages*, Section 122. The evidence is abundant and undisputed in this case that there was a large number of idle and surplus horses in this area, on the adjacent Indian

reservation and in the next county (R. 104–106, 119–120, 132–133, 245–246, 264, 287, 335–339, 401–404). We have shown, *supra*, pp. 58–59, that there was a general market and market value for horses in the vicinity which the court erroneously declined to consider. There was also a market among the Indians. The evidence is and the court found that horses were "freely traded" among the Indians (R. 39, 267, 283–287). These traded horses were, of course, subject to the same instinct to return to their birthplace as were those involved in this case, but that fact was evidently not a deterrent to trading.

With further reference to the value of Indian horses in a market used by the Indians, the Government repeatedly sought to prove and develop the fact that there was such a problem of surplus horses on the adjacent Indian reservation that the Indian Service was buying large numbers of them at $10 per head (R. 245–246, 287, 335–336, 337–338). In each instance, the court either ruled the evidence out, curtailed it, or expressly excluded it from consideration. This action was in marked contrast to the liberality of the court in receiving, developing, and directing evidence for the petitioners throughout the trial. The rejected evidence was competent and of the utmost materiality to the issue of value. The Government should have been permitted to develop it because it could detract substantially from the values adduced for the petitioners. The exclusion

and curtailment of this evidence was plain error.

2. *Consequential damages.*—The District Court made an award for consequential losses resulting from the destruction of the petitioners' horses and burros (R. 39–41, 43–47, 275, 282, 325–326). The losses of this type recited by the court for which an award was made included cattle, sheep, goats, game, pine nuts, and corn. They also included the increased difficulty in traveling for water, wood, supplies, council meetings, trade, ceremonies, visits and medical care. No amount was stated by the court as its award for these losses. It is evident, however, from the court's concern over the matter that the amount was large.

Many of those items are susceptible of measurement both as to quantity and value. The petitioners offered no evidence of quantity and value.[24] It is plain that the quantity would vary among individuals or families and that the quantity of these items cannot be estimated from the number of horses lost by each, which was the only figure supplied. There was no showing of income before and after the taking of the horses.

[24] A value for cows and sheep was stated in connection with valuing the horses. But no quantities, before and after the loss of the horses, were supplied except as to Sakezzie (R. 194). He did not state a quantity as to the other items. The testimony of Ira Hatch (R. 263) that in 1929 the petitioners owned 13,000 sheep and goats and "today" they own 3,000 does not furnish a basis for computing quantity. The statement of Little Wagon (R. 254) as to how many sheep he has "now" is also insufficient.

There was nothing presented upon which any approximation of the measurable, consequential losses could be based. The proof, therefore, does not support the award for these losses.

3. *Mental pain and suffering.*—The Court made an award for mental pain and suffering (R. 40–41). It did not state the amount. Such an award is allowable in connection with the conversion of personal property only if the act was done willfully or maliciously. 15 Am. Jur. *Damages*, Section 181. As shown above (*supra*, pp. 14–20, 23–25, 26–27, 31–43), the evidence here provides no support for the court's inference of willful or malicious conduct. Moreover, an award for mental suffering, while not susceptible of definite calculation, is subject to review and reversal for excessiveness. *Id.*, Section 183. The court erred in not stating the amount awarded so that it could be reviewed. In addition, it would seem that such damages, which are awarded only in the case of willful and malicious torts rather than torts based on negligence, are punitive and are not recoverable from the United States under the Tort Claims Act. 28 U. S. C. 2674.

V

AS PETITIONERS SUBSTANTIALLY CONCEDE, THE INJUNCTION ISSUED BY THE DISTRICT COURT WAS ERRONEOUS

Although petitioners sought no such relief in this action against the United States for damages

under the Tort Claims Act, the District Court issued a restraining order against the United States and its agents and employees forbidding further interference with petitioners or their livestock in the possession and use of "these public lands, and from taking further action under any of the applicable laws and regulations to dispose of any of said lands or any interests therein" (R. 47–49). Petitioners now concede (Br. 48–49, 50) that the District Court lacked jurisdiction to enjoin the United States, but seek to reinstate the injunction against the government agents. But their plainly sound concession destroys this attempt. The United States *eo nomine* was the only defendant in this action. Had there been power to enjoin this defendant, the injunction against the agents, as the only instruments for action by the Government, might have been permissible as an incidental matter. But the District Court never acquired jurisdiction over the agents individually and there is no basis for reviving its attempted injunction against them.[25]

[25] While it obviously cannot cure the fatal jurisdictional defect they concede, petitioners argue under their discussion of the injunction (Br. 48–49) that there was a "flagrant flouting of judicial authority" in the fact that this round-up was conducted during the pendency of the trespass action of *United States* v. *Hosteen Tse-Kesi*, 191 F. 2d 518 (C. A. 10). They overlook the fact that the *Hosteen* case was directed principally against the numerous bands of sheep in the area (R. 115). It was conducted under 43 C. F. R. 161.11 (Pet. Br. 54) against some of the petitioners as specifically known trespassers on the federal range. It was not, as were the

It may be observed, furthermore, that petitioners expressly disclaimed any effort to litigate the supposed problem the District Court undertook to preserve by the injunction issued *sua sponte*. The injunction was framed to endure until the court at some future time, on its own volition, might take evidence upon and determine the property rights of the United States and petitioners in and to the area in question (R. 47–49). However, when evidence on the question of title was requested by the court during the trial of the tort issue, counsel for petitioners stated that the question "was not one for which I was prepared when I came into this action, having restricted it to a claim in tort for the taking of the horses" (R. 278). The court acknowledged repeatedly that the "Indian prob-

proceedings here, directed against the abandoned animals of unknown owners. And there was sound reason for concurrently invoking all legal procedures, appropriate to the respective subjects, to rid the range of unauthorized animals during that period of severe drought. The *Hosteen* case was appropriately dismissed when an investigation, requested by the Bureau of Land Management officials in Salt Lake City, showed that the Indians had returned to the reservation with their sheep (R. 115). Even if the Indians returned to the reservation because these horses were destroyed, as contended, that fact does not support a charge of flouting judicial authority. The two actions related to different subject matters. Both actions were legally valid and were required by the condition of the range. It should be noted, moreover, that any use of the land by many of petitioners directly flouts the injunction issued in *Young* v. *Felornia*, 244 P. 2d 862 (Utah), restraining them "from any further use" of the land involved.

lem," including possessory rights, if any, is one for "the executive department of the government," is "not a problem for a court" and "is not necessarily and not directly involved here" (R. 215–227, 274). Nevertheless, after stating that "this lawsuit doesn't necessarily involve the questions about the real estate," the court decided to try the question because "It was always my notion that sometime we ought to try that out" (R. 216, 217).

The court's earlier observations were correct. It lacked power to issue its injunction against anybody.

CONCLUSION

For the foregoing reasons, the judgment of the Court of Appeals should be affirmed.

Respectfully submitted.

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APPENDIX

The Federal Tort Claims Act provides in pertinent part as follows (28 U. S. C.):

Sec. 1346 (b). Subject to the provisions of chapter 171 of this title, the district courts, together with the District Court for the Territory of Alaska, the United States District Court for the District of the Canal Zone and the District Court of the Virgin Islands, shall have exclusive jurisdiction of civil actions on claims against the United States, for money damages, accruing on and after January 1, 1945, for injury or loss of property, or personal injury or death caused by the negligent or wrongful act or omission of any employee of the Government while acting within the scope of his office or employment, under circumstances where the United States, if a private person, would be liable to the claimant in accordance with the law of the place where the act or omission occurred.

* * * * *

Sec. 2680. The provisions of this chapter and section 1346 (b) of this title shall not apply to—

(a) Any claim based upon an act or omission of an employee of the Government, exercising due care, in the execution of a statute or regulation, whether or not such statute or regulation be valid, or based upon the exercise or performance or the failure to exercise or perform a discretionary function or duty on the part of a federal agency or an employee of the

Government, whether or not the discretion involved be abused.

* * * * * * *

(h) Any claim arising out of assault, battery, false imprisonment, false arrest, malicious prosecution, abuse of process, libel, slander, misrepresentation, deceit, or interference with contract rights.

* * * * * * *

The Taylor Grazing Act of June 28, 1934, 48 Stat. 1269, as amended, 43 U. S. C. 315–315r, contains the following provisions:

Sec. 1. That in order to promote the highest use of the public lands pending its final disposal, the Secretary of the Interior is authorized, in his discretion, by order to establish grazing districts or additions thereto and/or to modify the boundaries thereof, not exceeding in the aggregate an area of one hundred and forty-two million acres of vacant, unappropriated, and unreserved lands from any part of the public domain of the United States (exclusive of Alaska), which are not in national forests, national parks and monuments, Indian reservations, revested Oregon and California Railroad grant lands, or revested Coos Bay Wagon Road grant lands, and which in his opinion are chiefly valuable for grazing and raising forage crops: *Provided*, That no lands withdrawn or reserved for any other purpose shall be included in any such district except with the approval of the head of the department having jurisdiction thereof. Nothing in this Act shall be construed in any way to diminish, restrict, or impair any right which has been heretofore or may be hereafter initiated under existing law validly affecting the public lands,

and which is maintained pursuant to such law except as otherwise expressly provided in this Act, nor to affect any land heretofore or hereafter surveyed which, except for the provisions of this Act, would be a part of any grant to any State, nor as limiting or restricting the power or authority of any State as to matters within its jurisdiction. * * *

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SEC. 18. (a) In order that the Secretary of the Interior may have the benefit of the fullest information and advice concerning physical, economic, and other local conditions in the several grazing districts, there shall be an advisory board of local stockmen in each such district, the members of which shall be known as grazing district advisers. Each such board shall consist of not less than five nor more than twelve members, exclusive of wildlife representatives, one such representative to be appointed by the Secretary, in his discretion, to membership on each such board. Except for such wildlife representatives, the names of the members of each district advisory board shall be recommended to the Secretary by the users of the range in that district through an election conducted under rules and regulations prescribed by the Secretary. No grazing district adviser so recommended, however, shall assume office until he has been appointed by the Secretary and has taken an oath of office. The Secretary may, after due notice, remove any grazing district adviser from office if in his opinion such removal would be for the good of the service.

(b) Each district advisory board shall meet at least once annually at a time to be fixed by the Secretary of the Interior, or by such other officer to whom the Secretary may delegate the function of issuing grazing permits, and at such other times as its members may be called by such officer. Each board shall offer advice and make a recommendation on each application for such a grazing permit within its district: *Provided*, That in no case shall any grazing district adviser participate in any advice or recommendation concerning a permit, or an application therefor, in which he is directly or indirectly interested. Each board shall further offer advice or make recommendations concerning rules and regulations for the administration of this Act, the establishment of grazing districts and the modification of the boundaries thereof, the seasons of use and carrying capacity of the range, and any other matters affecting the administration of this Act within the district. Except in a case where in the judgment of the Secretary an emergency shall exist, the Secretary shall request the advice of the advisory board in advance of the promulgation of any rules and regulations affecting the district.

Title 3, Chapter 5, Sections 115, 116, 122 and 123, Utah Code Annotated (1943), provide:

3–5–115. Brands—Recording.

Every livestock owner who allows his livestock over six months of age to range upon the open range or without an enclosure, shall have and adopt a brand and shall brand his livestock with such brand,

which brand must be recorded in the office of the state board of agriculture.

3–5–116. Unlawful to Use Unrecorded Brand, or to Disfigure or Remove Brand.

It is unlawful to brand and mark any livestock in this state with a brand and mark unless such brand and mark is recorded.

It is unlawful for any person to obliterate, disfigure, extend, add to, deface or remove a recorded brand or mark.

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3–5–122. Owner to Procure Certified Copy of Recording.

Upon the recording of such brand and mark as provided in this chapter the owner shall procure from the state board of agriculture a certified copy of recording such brand and mark.

3–5–123. Id: Evidence of Ownership of Branded Animals.

The certified copy of recordation thus secured in the foregoing section shall be prima facie evidence of the ownership of such animal or animals by the party whose brand and mark it might be and shall be taken as evidence of ownership in all courts of law or equity or in any criminal proceedings when the title to the animal is involved or property to be proved.

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